290 US 365 U. S. Sup. Ct. Records, Briefs 1933
Helvering v. Butterworth No. 75*

Card 1

*Together with No. 76, Helvering, Comm'r, v. Fidelity-Philadelphia Trust Co., Trustee, and No. 77, Helvering, Comm'r, v. Pardee et al., Trustees; and No. 78, Helvering, Comm'r, v. Title Gurantee Loan & Trust Co., Trustee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 75

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, AND GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF WILLIAM B. BUTTERWORTH, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 Before the United States Board of Tax Appeals

Docket No. 44368

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH & GIRARD TRUST CO., Trustees Under the Will of Wm. B. Butterworth, Deceased, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, respondent

Appearances: For petitioners—Charles Myers, Esq.; for respondent—M. E. McDowell, Esq., L. A. Luce, Esq.

Docket entries

May 11, 1929. Petition received and filed. Taxpayer notified. (Fee paid.)
May 13, 1929. Copy of petition served on General Counsel.
July 5, 1929. Answer filed by General Counsel.
July 9, 1929. Copy of answer served on taxpayer—assigned to General Calendar.
Aug. 26, 1930. Hearing set Nov. 11, 1930.
Sept. 9, 1930. Motion for leave to amend petition filed by taxpayer—amendment tendered.
2 Sept. 10, 1930. Motion granted.
Sept. 13, 1930. Copy of motion and amended petition served on General Counsel.
Nov. 11, 1930. Hearing had before C. R. Arundell, division 7, on merits. Case held open to Dec. 11, 1930, for submission of further evidence. Petitioner's brief due Dec. 12, 1930; respondent's due Jan. 12, 1931, and reply briefs due Jan. 25, 1931.
Dec. 1, 1930. Transcript of hearing of Nov. 11, 1930, filed.
Dec. 8, 1930. Motion for 30 day extension to file stipulation of correct deficiency filed by taxpayer.
Dec. 8, 1930. Motion granted.
Dec. 12, 1930. Brief filed by taxpayer.
Jan. 3, 1931. Stipulation as to deficiency filed.
Jan. 9, 1931. Brief filed by General Counsel.
Jan. 22, 1931. Reply brief filed by taxpayer—copy served on General Counsel.
June 23, 1931. Findings of fact and opinion rendered—C. R. Arundell, div. 7. Decision will be entered determining the deficiencies in the amounts stipulated.
June 29, 1931. Decision entered—C. R. Arundell, division 7.

Dec. 21, 1931. Petition for review by U.S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.
Dec. 21, 1931. Proof of service filed.
3 Feb. 9, 1932. Motion for 30-day extension to prepare and transmit record filed by taxpayer.
Feb. 9, 1932. Order enlarging time to Mar. 19, 1932, for preparation of evidence and delivery of record sur petition for review entered.
Feb. 25, 1932. Agreed statement of evidence lodged.
Feb. 29, 1932. Agreed statement of evidence approved and filed.
Mar. 5, 1932. Præcipe filed.
Mar. 16, 1932. Proof of service filed.
Mar. 17, 1932. Order enlarging time to April 15, 1932, for transmission and delivery of record sur petition for review entered.
4 Before the United States Board of Tax Appeals

[Title omitted.]

Petition

Filed May 11, 1929.

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT: FHH-60D, dated March 13, 1929, and as a basis of their proceeding allege as follows:

(a) Your petitioners are the trustees under the will of William B. Butterworth, deceased, who died October 5, 1921, a resident of Philadelphia County, Pennsylvania, leaving a last will duly probated before the register of wills of said county, by the terms of which he appointed petitioners as trustees. Petitioners have received notice from the respondent that the determination of petitioners' tax liability under the Revenue Act of 1926 for the years 1924 and 1925 discloses a deficiency of $3,304.51, and this proceeding is brought to determine the petitioners' liability for said deficiency.

5 (b) The amount of the deficiency, the nature of the tax, and the years for which asserted, are set forth in the notice received by the petitioners from the respondent, a copy of which marked "Exhibit A" is hereto attached and hereby made a part hereof.

(c) Your petitioners allege that the respondent erred in determining that petitioners are subject to a further tax liability of $3,304.51 for the years 1924 and 1925.

(d) Under the will of the said William B. Butterworth, deceased, a copy of which marked "Exhibit B" is hereto attached and hereby made a part hereof, he gave to his widow, Julia Butterworth, the net income from his residuary estate for and during the full term of her natural life. Said widow elected to take under said will by

writing signed and acknowledged by her delivered to the executors of the decedent, and filed and recorded as required by section 23 of the act of Assembly of Pennsylvania of June 7, 1917, P.L. 403.

(e) Your petitioners aver that under the acts of assembly above referred to and section 3 of the act of assembly of said State, approved June 7, 1917, P.L. 429, the provision made for decedent's widow in his will, which she elected to take, was in lieu and full satisfaction of her dower interest at common law in his estate, and is not subject to the payment of Federal income tax by the widow or by the petitioners as trustees for her. Your petitioners are further advised and therefore aver that the amount paid to said widow during the years 1924 and 1925 by the petitioners, in compliance with the terms of the decedent's will, are wholly exempt from Federal income tax.

(f) Your petitioners aver that as trustees under the will of
6 said William B. Butterworth, deceased, they have filed income-tax returns as required by law for the years 1924 and 1925, and have paid the full amount of income tax due from them under the law for said years.

(g) Wherefore, your petitioners pray that this Board may hear the proceeding and determine that the additional tax liability assessed against the petitioners for the years 1924 and 1925 under the Revenue Act of 1926, as aforesaid, was erroneously assessed.

And your petitioners will ever pray, etc.

BARNES, [illegible]OLE & MYERS,
By CHARLES MYERS,
Counsel for Petitioners,
1421 Chestnut Street, Philadelphia, Pa.

[Duly sworn to by J. H. Lawson; jurat omitted in printing.]

7 *Exhibit A to petition*

TREASURY DEPARTMENT,
Washington, March 13, 1929.

IT: FHH-60D.
Est. of WM B. BUTTERWORTH,
c/o Girard Trust Co., Phila., Pa.

SIRS: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1924 and 1925 discloses a deficiency of $3,304.51, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D.C.,

for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

D. H. BLAIR, *Commissioner*,
By J. S. MACLAUGHLIN,
Collector of Internal Revenue.

8

STATEMENT

IT:FHH-60D

MARCH 13, 1929.

In re: Est. of WM. B. BUTTERWORTH,
c/o Girard Trust Co., Phila., Pa.

Year	Corrected tax liability	Tax previously assessed	Deficiency
1924	$1,399.70	$13.51	$1,386.13
1925	2,092.82	174.44	1,918.38
Total	3,492.52	187.95	3,304.51

In accordance with the decision in the case of Warner v. Walsh (15 Fed. 2d) 367, the amounts paid a widow who elects to accept a testamentary provision for the payment to her of a certain sum annually of trust income in lieu of dower, should be regarded as capital expenditures applied in purchase of her dower right and not as distributions of income to a beneficiary. In other words the particular estate or trust should be held subject to the tax accruing upon the amounts of income turned over to the widow.

Therefore, the amounts paid annually to Julia Butterworth by the estate of Wm. B. Butterworth, as shown by the returns form 1041 filed by you as trustee for 1924 and 1925 are taxable to the estate.

Exhibit B to petition

Be it remembered that I, William B. Butterworth, of Fort Washington, in the State of Pennsylvania, being of sound and disposing mind, memory, and understanding, do make, publish, and ordain my last will and testament in manner following, that is to say:

9 First. I order and direct that all my just debts and funeral expenses shall be fully paid and satisfied by my executors, hereinafter named, as soon after my decease as may be practicable and convenient.

Second. I give and bequeath to my wife, Julia Butterworth, all my jewelry and personal effects of like nature. I also give and

bequeath to her my household furniture, horses, carriages, and automobile, together with all farm implements and articles of like nature now at my home at Fort Washington, in the State of Pennsylvania.

Third. All the rest, residue, and remainder of my estate, real, personal, and mixed, whatsoever and wheresoever, I give, device, and bequeath unto my trustees, hereinafter named, in trust to invest and keep invested in such securities as they, in their discretion, may deem for the best interests of my estate, and to pay over the net income arising therefrom to my said wife, Julia Butterworth, for and during the full term of her natural life. And from and after the decease of my said wife, I order and direct my trustees to pay over one equal fourth share or part of my residuary estate unto my niece, Emma B. Holmes, daughter of my sister, Amanda B. Hellings; and the other three-fourths part of the principal of my residuary estate I order and direct my said trustees to divide equally share and share alike among my nephews and nieces, namely: Harry W. Butterworth, Elizabeth W. Butterworth, Albert W. Butterworth, James Warner Butterworth, Henry W. Butterworth, Annie E. Butterworth, and Lillian P. Kolstead, nee Butterworth.

Fourth. In order that the terms of my said will may be more conveniently carried into effect, I do authorize and empower my said executors and trustees and the survivor of them, as such time or times as they may deem expedient and for the best interests of my estate, by public or private sale or sales, for the best price or prices that can be obtained therefor, at their discretion, to sell and dispose of the whole or any part of the real estate of which I may die seized, and to make, execute, and deliver all deeds, conveyances, assurances, and writings which may be necessary in law to grant and convey a good and proper title therefor to the purchaser or purchasers thereof in fee esimple, free and clear of and from the uses and trusts hereinabove expressed, and limited of and concerning the same, without the purchaser or purchasers thereof being liable for or obliged to see to the proper application of the purchase money.

Fifth. I nominate, constitute, and appoint my wife, Julia Butterworth, my nephew, Henry W. Butterworth, and the Girard Trust Company as executors of this my last will and testament, and trustees for the uses and purposes therein expressed; and I hereby revoke all former wills and testaments by me at any time heretofore made, declaring these presents only to be my last will and testament.

In witness whereof I, the said William B. Butterworth, have hereunto set my hand and seal this eighteenth day of March, A.D. one thousand nine hundred and ten (1910).

WILLIAM B. BUTTERWORTH [SEAL]

Signed, sealed, published, and declared by *by* the within named testator as and for his last will and testament in the presence of

us, who at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ELLEN R. KRONEBERGER.
WINFIELD W. CRAWFORD.

11 I, Julia Butterworth, having read the foregoing will of my husband, William B. Butterworth, hereby agree, in consideration of one dollar to me in hand paid by my said husband, the receipt whereof I do hereby acknowledge, and also in consideration of the devices and bequests to me, which are to be in lieu of dower, as set forth in the said will, to waive, release, and relinquish all right or claim whatsoever which I now have or may hereafter acquire to dower out of my said husband's estate, and to accept in lieu thereon the provisions and terms of the said will.

In witness whereof I have hereunto set my hand and seal this eighteenth day of March, A.D. 1910.

JULIA BUTTERWORTH [SEAL]

Signed, sealed, and delivered in the presence of

ELLEN R. KRONEBERGER.
WINFIELD W. CRAWFORD.
per B.

This is a true and correct copy.

GIRARD TRUST COMPANY,
By (name illegible),
Asst. Trust Officer.

12 Before U. S. Board of Tax Appeals

Answer

Filed July 5, 1929

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(a) and (b) Admits the allegations contained in paragraphs (a) and (b).

(c) Denies that he erred in determining the tax set forth in said notice of deficiency, and further denies that he erred as alleged in paragraph (c) of the petition.

(d) and (e) Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs (d) and (e) of the petition and therefore denies the same.

(f) Denies the allegations contained in paragraph (f) of petition.

(g) Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Sgd.) C. M. CHARRET,
General Counsel, Bureau of Internal Revenue.

Of counsel:
L. A. LUCE,
Special Attorney, Bureau of Internal Revenue.

13 Before U.S. Board of Tax Appeals

Motion by petitioners to amend petition

Filed September 9, 1930.

Come now the petitioners, by their attorneys, and move the Board for leave to amend their petition by filing and attaching thereto the affidavits of Julia Butterworth and Henry W. Butterworth hereto attached.

BARNES, BIDDLE & MYERS,
By CHARLES MYERS,
Attorneys for Petitioners.

Granted September 10, 1930.

(Sgd.) JOHN M. STERNHAGEN,
Member, U.S. Board of Tax Appeals.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Julia Butterworth, being duly sworn according to law, deposes and says that she is one of the trustees under the will of William B. Butterworth, deceased, and one of the petitioners named in the petition filed in this proceeding; that she has read said petition and is familiar with the statements therein contained, and the facts stated therein are true and correct; that the above-mentioned petition shall have the same force and effect as though deponent had joined therein and added to said petition an affidavit similar to the one made by her cotrustee; and that the petition filed by deponent's cotrustee, Girard Trust Company, was filed with the consent of this deponent.

JULIA BUTTERWORTH.

Sworn to and subscribed before me this eighth day of September, A.D. 1930.

[SEAL]

DANIEL L. CULLEN,
Notary Public.

My Commission expires March 2, 1933.

14 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Henry W. Butterworth, being duly sworn according to law, deposes and says that he is one of the trustees under the will of William B. Butterworth, deceased, and one of the petitioners named in the petition filed in this proceeding; that he has read said petition and is familiar with the statements therein contained, and the facts stated therein are true and correct; that the above-mentioned petition shall have the same force and effect as though deponent had joined therein and added to said petition an affidavit similar to the one made by his cotrustee; and that the petition filed by deponent's cotrustee, Girard Trust Company, was filed with the consent of this deponent.

HENRY W. BUTTERWORTH.

Sworn to and subscribed before me this twenty-eighth day of August, A.D. 1930.

[SEAL] DANIEL L. CULLEN,
Notary Public.

My commission expires March 2, 1933.

15 Before U.S. Board of Tax Appeals

Stipulation re deficiency

Filed January 3, 1931

It is hereby stipulated and agreed by and between the parties to the above-entitled proceeding, through their respective counsel of record, that if the respondent's determination in regard to the isue set forth in the petition herein is sustained, that there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60 against these petitioners, as trustees under the will of William B. Butterworth, deceased.

(Sgd.) CHARLES MYERS,
Counsel for Petitioners.
(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

16 BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 44368

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, AND GIRARD TRUST Company, Trustees Under the Will of William B. Butterworth, Deceased, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decedent's widow elected to take under the will in lieu of dower. In the taxable years the trustees under decedent's will paid over to

the widow the sums to which she was entitled under the will and claimed deductions therefor in computing net income of the testamentary trust. The amounts so paid to the widow, plus the amounts similarly paid to her in previous years, were not equal to the value of the dower interest that she relinquished by electing to take under the will.

Held that the amounts paid to the widow were paid to her in satisfaction of her dower right and not distributions of income within the meaning of section 219 (b) (2) of the Revenue Act of 1924, and hence are not deductible in computing net income of the trust.

Charles Myers, Esq., for the petitioners; Burton E. Eames, Esq., as amicus curiæ; M. E. McDowell, Esq., for the respondent.

Findings of fact and opinion

Promulgated June 23, 1931

17 The respondent determined deficiencies in income tax for the years 1924 and 1925 in the respective amounts of $1,386.13 and $1,918.38. The deficiencies arise out of the disallowance of claimed deductions by the trustees of amounts paid decedent's widow under the will, the widow having elected to take thereunder in lieu of dower. The issue is whether such disallowance was proper.

The parties have stipulated that if the respondent is sustained in his disallowance of the deductions claimed, the correct deficiencies are $319.54 for 1924 and $968.60 for 1925 instead of the amounts determined.

FINDINGS OF FACT

The petitioners herein are executors and trustees of the estate of William B. Butterworth, who died testate on October 5, 1921, while a resident of Pennsylvania. The will, dated March 18, 1910, after disposing of certain personal belongings, provided in part as follows:

"Third: All the rest, residue, and remainder of my estate, real, personal, mixed, whatever and wheresoever, I give, devise, and bequeath unto my trustees hereinafter named, in trust to invest and keep invested . . ., and to pay over the net income arising therefrom to my said wife, Julia Butterworth, for and during the full term of her natural life, ..."

Provision was made for the disposition of the corpus following the death of the deceased's widow. By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Julia Butterworth, the widow, elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

18 During 1924 and 1925, the years involved in the proceeding, the trustees made payments to the widow as provided for under the will, which amounts, added to payments of prior years,

did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

In filing returns for the years 1924 and 1925 the petitioners as trustees, when computing taxable net income, deducted from gross income the amounts distributed to the widow in the same manner as they deducted amounts similarly distributed to other beneficiaries under the testamentary trust.

OPINION

ARUNDELL: By decedent's will it was provided that his property, after making certain specific bequests, should be placed in trust and the income therefrom paid to the widow. Under the statutes of Pennsylvania a surviving spouse may elect to take either under or against the will. Election to take under the will bars the right of the survivor to dower or any statutory interest in the estate of the decedent. Sec. 8335 et seq. Penna. Stat. 1920; Purdon's Penna. Stat., title 20, §261. In this case the widow elected to take under the will, and during the taxable years the trustees, pursuant to the directions of the will, paid her the income produced by the property held in trust under the will.

The statute here involved is section 219 of the Revenue Act of 1924 which, as far as material here, provides:

"SEC. 219. (a) The tax imposed by . . . this title shall apply to the income of estates or of any kind of property held in trust, including—

"(2) Income which is to be distributed currently by the fiduciary to the beneficiaries . . .;

"(b) Except as otherwise provided . . ., the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

"(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries . . . but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.

Under this statute the trustees claim that in computing the net income of the trust they are entitled to deduct the sums paid to the widow as "income . . . distributed currently by the fiduciary to the beneficiaries." The respondent disputes this claim on the ground that, because certain court decisions hold that payments

received by a widow under the circumstances herein are not taxable to her, the payments may not be deducted by the trustees, as it is only income that is taxable to the beneficiary that is deductible.

In Warner v. Walsh, (C.C.A. 2nd Circuit) 15 Fed. (2d) 367, there was a testamentary trust and decedent's widow was to receive an annuity for life out of the income, but if necessary, out of the principal. Those provisions were in lieu of the widow's statutory rights in decedent's estate and were so accepted by her. The question for decision was whether the widow was subject to tax on the annuities received. The court held that the widow was not taxable on the amounts received until they equalled the value of her surrendered dower right saying in part:

20 "What we have here is, in fact and in legal effect, the purchase of an annuity, in no way differing fom an annuity purchasable by the widow from an insurance company, with the proceeds of her statutory rights in the estate, except only that in such a purchase she would have an unsecured obligation, whereas here the obligation is secured by the income and principal of the trust fund. That such a relinquishment of dower rights is a purchase of the will provision is well and long established. Burridge v. Beabyl, 1 Pere Wms. 127 (1710); Isenhart v. Brown, 1 Edw. Ch. (N.Y.) 413 (1832); Requa v. Graham, 187 Ill. 67, 58 N.E. 357, 52 L.R.A. 641 (1900). That a purchased annuity, even if income, is exempt as and to the extent that it is a return of premiums paid therefor; that is, until the purchase price shall have been returned, is determined by the express provisions of the acts above cited, as construed by the Bureau of Internal Revenue."

There was much the same situation in United States v. Bolster (C.C.A. 1st Circuit) 26 Fed. (2d) 760, except that the widow was to receive the income from the testamentary trust instead of a fixed annuity as in Warner v. Walsh, supra. The testamentary provision for the widow in the Bolster case was expressly made in lieu of dower. In that case the court said in part:

"The Federal income tax laws recognize the legal status of the taxpayer as created by local law, and fix the taxes in accordance with such law. By the General Laws of Massachusetts (chapter 191, § 15), as well as under the earlier statutes, a surviving husband or wife may refuse to accept the provisions of a will and take his or her statutory share in the corpus of the estate as if the deceased had died intestate. When the surviving husband or wife accepts the pro- provisions of the will, whether or not such provisions are expressly declared to be 'in lieu of such statutory rights,' the survivor

21 is in the position of one who sells property to the estate, and acquires the legal status of 'a purchaser for a valuable consideration.'

"In Pollard v. Pollard, 1 Allen, 490, 491, speaking for the Supreme Judicial Court of Massachusetts, Chief Justice Bigelow said:

"'The bequest in this case to the widow of the testator is made in express terms in lieu of dower, and on condition that she relinquishes all her right and title thereto.

"'A wife cannot be deprived of her dower except by her own consent. Therefore, when she accepts a provision in her husband's will as a substitute for this existing legal right, the law regards her as standing in the light of a purchaser for a valuable consideration, and entitled to receive the whole of the sum given by the will, for which she has relinquished her life estate in one third of the testator's real estate, in preference to other legatees, who, being only objects of the bounty of the testator, and not having any legal claim on his estate, are regarded as volunteers, and are not allowed to take until the widow has received the full amount of the bequest to her.'

. . . . . .

"Under the principles announced by the Supreme Judicial Court of Massachusetts, we think that, in the case before us, the payments made to Sarah A. Davenport during the years in dispute represented 'purchase money' or 'installment payments' by the estate in consideration for her share in the corpus of the estate. We think, then, that she was a 'purchaser for value.'

. . . . . .

"In the case at bar the local law gave Sarah A. Davenport the status of a 'purchaser for value.' The Federal income tax law recognizes that status. We think it clear that she was not liable for the payment of any of the taxes in dispute; . . .

. . . . . .

22 "While in the Warner case the court had before it an annuity, the provision relating to the annuity was made expressly in lieu of statutory rights of the beneficiary in the estate; we think the principles announced in that case are controlling in the case before us. . . ."

In Allen v. Brandeis (C.C.A. 8th Circuit) 29 Fed. (2d) 363, the testator gave his widow an annual sum of $50,000 for life in lieu of dower, and the widow elected to take under the will and relinquish her dower interest in the estate. Following the Warner and Bolster cases, supra, the court held that the annual sums received by the widow were not taxable until she had recovered the value of her interest in the decedent's estate which she had relinquished by her election. The opinion reads in part:

"It is freely conceded, if the widow had taken the amount of her interest in the estate, and with that sum had purchased an annuity of $50,000.00 per annum for a period of years, such annuities, when paid to her, would not have been taxable to her under the law, for the laws above referred to so provide. In legal effect, is that not precisely what was done in this case? She took her property by her acquired under the laws of the state, turned the same over to her husband's estate under an agreement she should receive as the

purchase price of her interest $50,000.00 per annum from the estate, that is to say, her invested capital was the value of her interest in her husband's estate, to wit, $483,727.79. By the expenditure of this sum, the same being her own money, she purchased an annuity of $50,000.00 per annum from those representing her husband's estate to be paid out of that estate. Clearly, in such case, under the law, she should not be required to pay any income tax on the annual payments received until her capital invested in the annuities shall have been returned to her."

23 After the adjudication of the above cases the respondent published ruling I.T. 2506, C.B. VIII-2, p. 129, holding that in such cases payments made to the widow prior to the time she recovers the value of her dower or statutory interest may not be deducted in computing the net income of the trust, and ruling I.T. 2480, C.B. VIII-2, p. 141, holding that after she has recovered the value of such interest "she is treated as any other income beneficiary" and the executors or trustees will then be permitted to deduct the annual payments in computing net income of the estate or trust. It is the validity of the first of these rulings that is in question here, that is, the treatment of the annual sums by the trustee before the time they equal the value of the right surrendered by the widow. We have no question as to the treatment of such sums by either the trustee or the widow after that time. We make this observation because there may arise a question as to whether such sums will then be technically annuities and not taxable as in Burnet v. Whitehouse, 282 U.S. —, or whether they are bequests of income and taxable as in Irvin v. Gavit, 268 U.S. 161, and Heiner v. Beatty, 17 Fed. (2d) 742, affirmed per curiam 276 U.S. 598.

The idea expressed by the Circuit Courts of Appeals in the above cases that annuities are not taxable until cost has been recovered finds support in the decision of the Supreme Court in Burnet v. Logan, —— U.S. —— (May 18, 1931). In that case the taxpayer in 1916 surrendered shares of stock for cash and the right to receive annually indeterminate future amounts based on the amount of ore removed from a mine. In 1917 the taxpayer inherited from her mother the right to receive similar payments on account of stock surrendered by the mother in 1916. In the years before the court the sums received by the taxpayer—the cash in 1916

24 plus subsequent annual payments—had not equalled the March 1, 1913, value or her surrendered stock, which value was greater than cost. Nor had the sums received by her on account of the stock surrendered by her mother equalled the value of her inherited right to receive future payments. As to the sums received from the surrender of the taxpayer's own stock, the court said:

"The transaction was not a closed one. Respondent [taxpayer] might never recoup her capital investment from payments only conditionally promised Prior to 1921 all receipts from the sale of her shares amounted to less than their value on March 1, 1913.

She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture."

As to the sums received as the result of inheritance, the court said:

"Some valuation—speculative or otherwise—was necessary in order to close the estate. It may never yield as much, it may yield more. If a sum equal to the value thus ascertained had been invested in an annuity contract, payments thereunder would have been free from income tax until the owner had recouped his capital investment. We think a like rule should be applied here. The statute definitely excepts bequests from receipts which go to make up taxable income. See Burnet, Commissioner, v. Whitehouse, 282 U.S. —— (April 13, 1931)."

Likewise, the proposition asserted by the Circuit Courts of Appeals, that the widow by acceptance of provisions of the will in lieu becomes a purchaser for value, is amply supported by authority. See cases cited in the Warner, Bolster and Brandeis cases. Such is the law of Pennsylvania. In *Appeal of Kline*, 117 Pa. St. 139; 11 Atl. 866, it is said:

"It is true that her acceptance under the will must be re-
25 garded as an acceptance in lieu of dower, and so to be taken as a purchase for a valuable consideration . . ."

In re Denis' Estate, 169 Pa. St. 493; 32 Atl. 436, holds that—

"She has surrendered her rights under the intestate law in accepting these provisions, and was therefore a purchaser for value of the testamentary provisions in her favor."

In re Taylor's Estate, 175 Pa. St. 60; 34 Atl. 307 holds:

"The widow, by accepting the provisions of the will in lieu of dower, is a purchaser for value . . ."

The above decisions consider the situation from the standpoint of the widow. Considered from the viewpoint of the estate, the holdings are that what occurs in a case of this sort is the purchase by the estate, through the trustee, of the share to which the surviving spouse was entitled. In Requa v. Graham, 187 Ill. 67; 58 N.E. 357, Mrs. Nichols by her will gave her husband an annuity in lieu of the interest in her estate to which he would be entitled. Suit was brought to subject the annuity to payment of a judgment against the husband. The holding of the court was that the husband was a purchaser of the annuity and consequently was not protected by a statute which exempted from creditors' bills trusts created by persons other than the debtor himself. In the course of the opinion the court says:

"The annuity in question was a mere offer by Mrs. Nichols to her husband for the purchase of his interest in her estate."

The opinion quotes from Blatchford v. Newberry, 92 Ill. 11, 62, as follows:

26 "A provision by will in lieu of dower is in fact and in legal effect a mere offer by the testator to purchase out the dower interest for the benefit of his estate."

Isenhart v. Brown, 1 Edw. Ch. 413, is quoted in Carper v. Crowl, 149 Ill. 465; 36 N.E. 1040; and Requa v. Graham, supra, in part as follows:

"It [a devise in lieu of dower] is the price put by the testator himself upon that right, and which she is at liberty to accept, . . . So, on the other hand, the husband offers a price for his wife's legal right of dower which he proposes to extinguish; and if she agrees to the terms, she relinquishes it and is entitled to the price. It is, therefore, a matter of convention or contract between them; and what she thus becomes entitled to receive is not by way of bounty—like other general bequests; but as purchase money for what she relinquishes."

To the same effect is Green v. Saulsbury, 6 Del. Ch. 371; 33 Atl. 623.

Section 219 of the Revenue Act of 1924, quoted above, deals with income. It taxes trust income primarily to the trustees, but it allows the trustee to deduct the "income . . . which is to be distributed currently by the fiduciary to the beneficiaries." This provision in our opinion relates solely to amounts paid as income to the objects of the testator's bounty. It does not apply to other payments by the trustee, as in this case where the trustee was completing the offer made to the widow for the purchase of her share in the estate; the trustee in such case was merely carrying out the "convention or contract" (Isenhart v. Brown, supra) between the testator and his widow. The widow in such a case is in no sense a beneficiary, but, as held by the authorities above quoted, she is a "purchaser for value." The statute taxes to a beneficiary only "income paid as such" (Burnet v. Whitehouse, 282 U.S.) and in our opinion contemplates the deduction by the trustee only of income paid as such to a pure beneficiary as, for example, in the Gavit and Beatty cases, supra.

27

Petitioners call our attention to the rule that in case of doubt, taxing statutes are to be construed against the Government and in favor of the citizen. In view of the authorities quoted as to the status of the widow who takes a bequest in lieu of dower, we think there is no doubt that the amounts paid to her in this case are not "income . . . distributed . . . to the beneficiaries" and there is no room for application of the rule urged.

It is also argued by the petitioners that the last clause of section 219 (b) (2), which provides that the amounts deducted by the trustees shall be included in the income of the beneficiary, is directed solely to the beneficiary and has no bearing on the preceding part of the section which gives the deduction to the trustee. We have indicated in our discussion so far that our decision is not rested on the last clause of section 219 (b) (2) but is based on the preceding part under which the trustees claim the deduction. But even conceding that there is merit to the claim urged, it does not help the petitioner's case. The point urged is illustrated by supposing the

beneficiary to be dishonest and failing to report income; or, as suggested by amicus curiæ, the beneficiary might be exempt from tax. The examples do not fit the present case because in them it is taken as a premise that there is a beneficiary who has received distributable income, and such is not the case here for reasons above given.

Petitioners also cite Lederer v. Stockton, 260 U.S. 3, in which the Supreme Court held that the trustee of a fund should not be taxed on the income from the fund which had been loaned to
28 an exempt institution pending the time the institution was entitled to it absolutely. During this time the institution enjoyed the income of the fund except a comparatively small part necessary to pay an annuity. The court held:

"As the hospital is admitted to be a corporation, whose income when received is exempted from taxation under § 11 (a), we see no reason why the exemption should not be given effect under the circumstances. To allow the technical formality of the trust, which does not prevent the hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

We think it obvious that that case has no application here. The taxing statute does not purport to put widows in an exempt class and we know of no provision for them which could be construed as evidencing in their behalf any "beneficent purpose of Congress." The Circuit Courts of Appeals cases discussed in the early part of this opinion are not authority for holding that widows constitute an exempt class of persons. Those cases merely put the widow in the same class as other purchasers of annuities, and who receive no taxable income until the cost of the annuities has been recovered.

It is also argued that, if the respondent's position is sustained, the widow gets no real benefit from the decisions holding nontaxable the payments made in lieu of dower. It is not the purpose of courts to construe taxing laws so as to confer benefits other than those prescribed by the statute. If it so happens that certain persons are benefited by one provision of the law, it does not follow that they must receive equal benefits under others. As pointed out above, the courts have not singled out widows and given them an exempt status, but have only in such cases as this, placed them in the same class as other purchasers of annuities.

29 In reaching our decision that the amounts paid to the widow in this case are not deductible by the trustee, we have not overlooked the case of Commissioner v. Moore Corporation, 42 Fed. (2d) 186; affirming 15 B.T.A. 1140. In that case Hattie I. Moore conveyed to the taxpayer certain land and buildings in consideration of the taxpayer's agreement to pay her $10,000 a year for life. It was held that each annual payment of $10,000 consisted in part of principal and in part of interest, and that the amount deductible by the taxpayer as interest was the difference between the $10,000 and its discounted value as of the date of the

conveyance. In this case there is no question as to apportionment, and we have no occasion to inquire into that question.

We also recognize that for some purposes a distinction must be drawn between a bequest of income and a bequest of an annuity. Cf. Whitehouse and Gavit cases, supra. But in the view we take it is not necessary to draw that distinction here. That question may arise after the widow has recovered the value of her dower right (Allen v. Brandeis and Burnet v. Logan, supra), but it is not present in the taxable years.

Reviewed by the Board.

Decision will be entered redetermining the deficiencies in the amounts stipulated.

STERNHAGEN concurs solely by reason of prior court decisions.

30 Before U. S. Board of Tax Appeals.

Decision

Filed June 29, 1931

Pursuant to the Board's findings of fact and opinion, promulgated June 23, 1931, it is

Ordered and decided: That there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60.

(Sgd.) C. ROGERS ARUNDELL,
Member, United States Board of Tax Appeals.

31 In United States Circuit Court of Appeals

Petition of Julia Butterworth, Henry W. Butterworth, and Girard Trust Company, Trustees under the will of William B. Butterworth, Deceased, for review by the Circuit Court of Appeals for the Third Circuit of a decision of the United States Board of Tax Appeals

Filed December 21, 1931

The above-named petitioners, by Charles Myers, their attorney, hereby petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the United States Board of Tax Appeals in the case of Julia Butterworth, Henry W. Butterworth, and Girard Trust Company, Trustees under the Will of William B. Butterworth, Deceased, petitioners, v. Commissioner of Internal Revenue, respondent, docket no. 44368, entered June 29, 1931, finding deficiencies in petitioners' income taxes for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60, and respectfully show:

I. NATURE OF THE CONTROVERSY

The petitioners are executors and trustees under the will of William B. Butterworth, who died testate on October 5, 1921, while a resident of Philadelphia County, Pennsylvania, leaving a last will duly probated before the register of wills of said county, by the terms of which he appointed petitioners as trustees. The will, dated March 18, 1910, after disposing of certain personal belongings, provided in part as follows:

"Third. All the rest, residue, and remainder of my estate, real, personal, mixed, whatever and wheresoever, I give, devise, and
32 bequeath unto my trustees hereinafter named, in trust to invest and keep invested . . ., and to pay over the net income arising therefrom to my said wife, Julia Butterworth, for and during the full term of her natural life, . . ."

Provision was made for the disposition of the corpus following the death of the deceased's widow.

By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Julia Butterworth, the widow, elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

During 1924 and 1925, the years involved in the proceeding, the trustees made payments to the widow as provided for under the will, which amounts, added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

In filing returns for the years 1924 and 1925 the petitioners as trustees, when computing taxable net income, deducted from gross income the amounts distributed to the widow under the testamentary trust.

On March 13, 1929, the Commissioner of Internal Revenue, by J. S. MacLaughlin, collector, mailed to your petitioners a deficiency letter stating therein that the determination of petitioners' tax liability for the years 1924 and 1925 disclosed deficiencies in the respective amounts of $1,386.13 and $1,918.38 in income taxes for said years.

Within sixty days from the date of said deficiency letter, to wit, on May 11, 1929, your petitioners filed their petition with the United States Board of Tax Appeals, appealing from the aforesaid determination of the Commissioner of Internal Revenue.

33 After hearing before the United States Board of Tax Appeals on November 11, 1930, the said Board on June 23, 1931, promulgated its findings of fact and opinion, in which it held that under section 219 of the Revenue Act of 1924, the petitioners, in computing the net income of the decedent's estate subject to income tax for the calendar years 1924 and 1925, were not entitled to deduct the amounts distributed to the decedent's widow, and on June 29,

1931, the Board, pursuant to said findings of fact and opinion, ordered and decided that there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60, the parties having stipulated that if the respondent should be sustained in his disallowance of the deductions claimed, the correct deficiencies are in the amounts stated.

II. COURT IN WHICH REVIEW IS SOUGHT

Petitioners aver that their income tax returns for the calendar years 1924 and 1925 were filed in the office of the collector of internal revenue for the first district of Pennsylvania, at Philadelphia, Pennsylvania, which collector's office is located within the third circuit, and this appeal is therefore taken to the United States Circuit Court of Appeals for the Third Circuit pursuant to section 1002 of the Revenue Act of 1926.

III. ASSIGNMENTS OF ERROR

(1) The United States Board of Tax Appeals erred in refusing to allow as a deduction in computing the net taxable income of the trustees under the will of William B. Butterworth, deceased, for the calendar years 1924 and 1925, the amount of the income of the trust that was distributed to the decedent's widow during said years.

34 (2) The United States Board of Tax Appeals erred in holding that the widow of William B. Butterworth, to whom was given by his will the income from his residuary estate for life, is not a "beneficiary" of his estate.

(3) The United States Board of Tax Appeals erred in entering final judgment for the Commissioner of Internal Revenue, as follows:

"Pursuant to the Board's findings of fact and opinion, promulgated June 23, 1931, it is ordered and decided: That there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $319.54 and $968.60."

CHARLES MYERS,
Attorney for Petitioners,
1421 Chestnut Street, Philadelphia, Pa.

[Duly sworn to by Charles Myers; jurat omitted in printing.]

35 Before U.S. Board of Tax Appeals

Statement of evidence to be included in the record sur petitioners' appeal to the United States Circuit Court of Appeals for the Third Circuit

Filed February 25, 1932

To the Clerk of the United States Board of Tax Appeals:

The evidence to be included in the record sur petitioners' appeal to the United States Circuit Court of Appeals for the Third Circuit

shall consist of the findings of fact contained in the opinion of the Board and the copy of the decedent's will attached to the petition for redetermination, which was received in evidence at the hearing on November 11, 1930.

CHARLES MYERS,
Attorney for petitioners.
1421 Chestnut Street, Philadelphia, Pa.

Approved.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Approved.
C. R. ARUNDELL,
Member, United States Board of Tax Appeals.

FEBRUARY 29, 1932.

36 Before U.S. Board of Tax Appeals

Praecipe for record

Filed March 5, 1932

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and on or before March 19, 1932, transmit and deliver to the clerk of the United States Circuit Court of Appeals for the Third Circuit, a transcript of the record in the above cause, prepared and transmitted as required by law and the rules of said court, and to include in said transcript of record copies of the following documents duly certified as correct:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination, including exhibits attached thereto.

(b) Answer of the respondent.

(c) Motion of petitioners to amend petition granted September 20, 1930.

(d) Stipulation setting forth the amount of deficiencies if the respondent's determination is sustained.

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The decision of the Board.

37 (5) The petition for review filed by the petitioners in the above cause.

(6) Statement of the evidence to be included in the record sur petitioners' appeal to the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) CHARLES MYERS,
Attorney for Petitioners.
1421 Chestnut Street, Philadelphia, Pa.

Service of a copy of the foregoing praecipe for the record accepted this day of March, 1932.

Attorney for Respondent.

38 [Clerk's certificate to foregoing transcript omitted in printing.]

39 [Minute entry of argument and submission, Oct. 6, 1932, omitted in printing.]

40 In United States Circuit Court of Appeals for the Third Circuit

October term, 1932

No. 4902

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, AND GIRARD TRUST Company, Trustees Under the Will of William B. Butterworth, Deceased, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review from the United States Board of Tax Appeals

Opinion

Filed March 3, 1933

Before WOOLLEY, DAVIS, AND THOMPSON, Circuit Judges

WOOLLEY, Circuit Judge: William B. Butterworth, a resident of Pennsylvania, died in 1921. By his will he bequeathed certain property to his wife absolutely and gave the residue of his estate to the petitioners, as trustees, to pay "the net income arising therefrom" unto his wife for life, with remainders over. His wife elected to take under the will in lieu of the interest in her husband's
41 estate which the law of Pennsylvania gave her. For several years the trustees paid her amounts which, in the aggregate, did not exceed the value of the interest in the estate to which, but for her election, she would have been entitled under the law. In filing income-tax returns for the years 1924 and 1925, the trustees, when "computing the net income of the estate or trust", deducted from gross income the part which they had distributed to the widow during those years, pursuant to terms of the applicable revenue acts as there stated and then understood. The Commissioner of Internal Revenue disallowed the deductions and, accordingly, assessed deficiency taxes against the trustees, whereupon they appealed to the

United States Board of Tax Appeals. The Board sustained the Commissioner. The trustees are here by petition asking this court to review and annul the Board's action.

The controversy before the tax tribunals and now before this court is the result of decisions by the Circuit Courts of Appeals for the First, Second, and Eighth Circuits in Warner v. Walsh, 15 Fed. (2d) 367; United States v. Bolster, 26 Fed. (2d) 760; and Allen v. Brandeis, 29 Fed. (2d) 363, wherein those courts held, in one form or another, that when a widow relinquishes her statutory rights in her husband's estate by electing to take in lieu thereof provisions made for her in his will, she takes as purchaser for a valuable consideration as though she had bought an annuity (People, ex rel. Kight v. Lynch, 255 N.Y. 323, contra), and money from the trust, earned as income, afterwards received by her under the will constitutes a return of her capital and therefore is not taxable, Eisner v. Macomber, 252 U.S. 189, until the payments she has received shall have equalled the value of her surrendered statutory rights. The Commissioner of Internal Revenue, realizing the effect of these decisions on taxation, revised the practice of the department
42 by rule I.T. 2506. In an effort to close the breach thus made in the collection of taxes, the Board of Tax Appeals, going a step beyond the decisions and deciding a question—the right of a fiduciary in computing net income of a trust to deduct the amount distributed to the widow—with which those courts were not confronted, sustained the Commissioner, holding that the widow, in case of election, became a purchaser, not in the sense in which the law distinguishes a taking by purchase from a taking by inheritance but a purchase by contract; that she purchased with her capital (her surrendered statutory rights) and what she received from the trust was capital returned; that, being a purchaser, she was not a beneficiary under the trust, that is, not a "pure beneficiary"; and that, in consequence, the fiduciary could not deduct for the distribution to her under the statutes which allowed a deduction only of distributions to "beneficiaries."

The practical effect of the Board's decision, if it stands, is to impose an unexpected tax burden upon the trust or upon other beneficiaries and, oddly enough, upon the widow herself. If it does not stand, the government will lose taxes; those which are not paid by the widow under the decisions and those which, because of deduction of income distributed, are not paid by the trust. The legal effect of the Board's decision on this case is reflected in the three questions of law submitted:

(1) Whether or not payments made by trustees to the widow under a will in case of her election represent a return of capital?

(2) If capital, is it deductible by the fiduciary in computing net income of the trust?

(3) Though under the decisions the widow is, on election,
43 a purchaser of the provisions made for her benefit in her husband's will is she still a "beneficiary" within the terms

of the revenue acts which permit a fiduciary "in computing net income of the estate or trust" to deduct the amount of income it has "distributed currently . . . to the beneficiaries"?

To these submitted questions we add one of our own: Whether the cited decisions, which, as we read them, extend and are limited to a finding that income of a trust in the hands of a widow after election is not taxable, affect the meaning of the revenue acts, which the Congress had previously passed in respect to deductions allowed the fiduciary in distributing income to beneficiaries?

The pertinent provisions of the revenue acts, section 219 a (2), b (2) (43 Stat. 253; 44 Stat. 9), whether of 1924 or 1926 which were identical in number and terms, and are now superseded by other acts, clearly provided several things in regard to the imposition and computation of taxes on trust estates: (1) That the tax shall be upon income; (2) that it be upon income either accumulated in trust for future purposes or upon income which has been or is to be distributed currently by the fiduciary to beneficiaries; (3) that it be computed upon net income of the trust; (4) that it be computed in the manner provided in section 212; (5) that, as an exception to the last provision, in computing net income for a taxable year there shall be allowed the fiduciary, as an additional deduction, "the amount of income of the . . . trust . . . which is to be distributed currently by the fiduciary to the beneficiaries"; and (6) that the "amount so allowed (the fiduciary) as a deduction shall be included by the beneficiaries in computing their taxable net income whether distributed or not."

In a word, the statutes intended that the trustees shall show in their returns distribution of income to beneficiaries; that they
44 may then deduct the same; and thereafter the beneficiaries shall pay the taxes on the amounts which they severally have received.

It should be noted that the first question submitted to us—whether payments to the widow, after election, of income from a trust constitutes a return of capital and therefore is not taxable—is the same question submitted to and decided by the three Circuit Courts of Appeals. An altogether different question before this court—one to which the widow, now exempt, is not a party—is whether the fiduciaries of the trust in returning income may deduct what they had distributed to the widow as a beneficiary and thus avoid taxes against themselves for that amount? As the first question is not before this court, we shall, of course, not pass upon it. The second submitted question is stated as a corollary of the first. We shall not discuss it— except casually in connection with another phase of the case. We shall, however, assume without deciding that the way in which the Circuit Courts of Appeals decided the question before them was right. We shall also assume that those courts, not having before them the question which is before this court, did not rule on that question. It follows that the three cited decisions do not rule this case either on facts or in law and are present only be-

cause of the trouble they have made in the collection of taxes and are pertinent only as the trend of their reasoning may, logically, influence an interpretation of the provision of the revenue acts in respect to deductions by fiduciaries in making the tax returns now under review.

On accepting for purposes of discussion the reasoning of the Circuit Courts of Appeals to the effect that a widow, on election, becomes a purchaser for a valuable consideration and income afterwards received by her from the trust is capital returned, the word "capital"—the critical word in exempting the widow from
45 taxation—is the only impediment to a literal interpretation of the plain words of the acts which allowed a deduction in such case. In connection with the phrase "capital returned" there is an intimation in the cases and a finding by the Board of Tax Appeals that the widow is a purchaser by reason of contract. All this may be sound law appropriately applied to the question before the Circuit Courts of Appeals. There we shall let it stand. But when the law of those cases is transposed into the altogether different question in this case, it encounters, we think, certain legally impassable barriers.

Turning to the statutes and looking upon their provisions with respect to taxation of trusts, they deal with income not of widows but of trusts and with distribution and computation of income by trustees for tax purposes. Indubitably, the thing the trustees here received from the estate was income. With equal certainty the thing they distributed to the widow was the same income they had received. They were without power to distribute anything else. No alteration in her status from a named beneficiary to a purchaser can change that fact. Income remains income regardless of a question whether it is taxable in a particular case. Moreover, what the widow elected to take under the will was income. That was the only thing the settler provided for her. Failing income earned, she would take nothing. The government does not go so far as to contend that, income failing, the trustees could return her capital by extracting it from the principal of the trust. Further, however, the words "purchaser" and "capital" should be used, it is manifest the widow was not a purchaser by contract. As widow she had two rights in respect to her husband's property: on which the state law gave her; the other which the will gave her. She might assert one or the other. This involved her election. Without making a
contract with the trustees, who, of course, were powerless to
46 make a contract disposing of their decedent's property, and wholly apart from the idea of mutual consent, the essence of a contract, she could, without anybody's consent, on her own election take under the law or under the will. If she takes by purchase in the sense of the law of acquisition as distinguished from the law of inheritance, she then takes under the will and is entitled to receive what the will provides for her. Whatever it may be in her hands for purposes of taxation, it is at all times income in the hands of

the trustees. That being so, the trustees must account for that income to the Government for purposes of taxation. This they did by making returns which conformed literally with existing law, yet showed no tax liability on their part. The Government says, in effect, in such case someone must pay the tax; now that the widow is free, the trustees (by disallowing the deduction) must pay, even if the tax is to be paid out of income payable to other beneficiaries and otherwise payable to the widow herself, or at the expense of remaindermen. The infirmity in this argument is that taxation is not imposed by reasoning or by an exigency but by statute and only those named in the statute must pay a tax. If in naming taxables it should, as here, later be found that the Congress (for whatever reason) omitted a class available for taxation, that is a misfortune of the Government which cannot be cured by a court reading into a statute something which is not there, or giving its words a meaning different from their known and ordinary signification, Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560; Heiner v. Beatty, 17 Fed. (2d) 743; 276 U.S. 598; Woolford Realty Co. v. Rose, 52 Pa. Sup. Ct. 568; and different from the way they were understood by tax officials and taxpayers and by them acted upon until the decisions by the Circuit Court of Appeals. Assuming that these decisions declared what had been the law all along, and assuming
47 also that, before the decisions, the Congress knew the law, it is pertinent to note that, in enacting the statutes, it made no exception in the generality of the provision taxing beneficiaries on income distributed under a trust, and no recognition that a changed status of a person named in the will from beneficiary to purchaser altered or changed the allowance of the deduction by the fiduciary of income so distributed. It said the fiduciary may deduct; not that he may deduct if or provided the income so deducted is taxable to the recipient. It distinctly did not say that he may not deduct if the income is not taxable to the recipient. In other words, the right of deduction which the Congress gave a trustee was not conditioned upon the taxability of the beneficiaries. The grant, by its terms, was absolute. Or, we may assume for purposes of discussion, and with entire respect, that the Congress did not know the law of the three cited cases until the Circuit Court of Appeals declared it. In that event the Congress made no provision for such a situation. It follows that in either case, knowing the law or not knowing the law, the Congress declared the way in which income from a trust estate should be computed and gave, without excepting the situation in this case and without any like limitation, a right to a fiduciary to deduct distributed income from gross income in making income-tax returns, and provided, accordingly, who should pay the tax. As that right was conferred upon a trustee by words of the statute which, standing apart from the three cited decisions, are so plain as not to admit of construction, we hesitate to withdraw the right by giving the words of the Congress a meaning different from what its words import merely because the Government will, unless this is done, lose revenue from a source of which it has not availed itself.

Construed literally and as not affected by the cited decisions
48 of the Circuit Court of Appeals, the provisions of the acts which allow a fiduciary a deduction for "income" "distributed . . . to beneficiaries", there remains the question whether the widow (a purchaser under the cases) is a beneficiary under the will? Unless the word "purchaser" has a legal meaning that excludes all other possible relations to the trust, we can conceive that, though acquiring her interest by purchase, she holds as a beneficiary. There is, undoubtedy, a trust. The trust provides benefits for several persons, among them the widow, should she choose to accept them. She chose. The method of her choosing (by purchase, we shall say) did not alter the status she attained by the choice. She receives benefits from the trust and, receiving benefits, she is a beneficiary and is none the less so because she may have given a valuable consideration in acquiring that status.

Section 219 of the revenue act deals generally with beneficiaries, not only in subdivision b (2), the one directly in question, but in subdivisions g and h. Of the word thus generally used, the Treasury Department, by regulation 65, article 347, announced its own definition:

"The term 'beneficiary' as used in this article includes any person entitled to an interest in the income or the principal of a trust, . . ."

It is admitted that the widow had an interest in the trust. It is to be assumed that the Congress in framing the section used the word "beneficiary" in the same sense in all cases. Pampanga Mills v. Trinidad, 279 U.S. 211, 218.

As the widow, admittedly, has an interest in the trust, it must be an equitable interest. Her rights are those of a beneficiary measured by the trust provisions in the will made for her benefit. They speak in terms of income. She has an equitable life estate in the trust and a right to its income for life. That she elected
49 the will instead of statutory rights cannot change the nature of the estate given to her by the will, or change her position as a cestui que trust. She is the object of the testator's bounty, involving benefits greater (she must have thought) than her statutory interest in her husband's estate, else she would not have elected to take them. Having so elected, she has taken the benefits the will provides, which is another way of saying she is a beneficiary under the will. Gruver v. Wood, 174 Mass. 540.

The judgment of the Board of Tax Appeals is reversed.

THOMPSON, Circuit Judge, dissenting.

A true copy.

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

50 In United States Circuit Court of Appeals for the Third Circuit

October term, 1932

No. 4902

JULIA BUTTERWORTH ET AL., TRUSTEES UNDER WILL WILLIAM B. Butterworth, Deceased, petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment filed March 3, 1933

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was aruged by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

Philadelphia, March 3, 1933.

VICTOR B. WOOLLEY, *Circuit Judge.*

[File indorsement omitted.]

51 [Clerk's certificate to foregoing transcript omitted in printing.]

52 Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1933

The petitioner herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File no. 37673. U.S. Circuit court of Appeals, Third Circuit. Term no. 75. David Burnet, Commissioner of Internal Revenue, Petitioner, vs. Julia Butterworth, Henry W. Butterworth, and Girard Trust Company, Trustees Under the Will of William B. Butterworth, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed May 17, 1933. No. 75, O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE, 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. —

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, and Girard Trust Company, Trustees Under the Will of William B. Butterworth, Deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of David Burnet, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in the above cause on March 3, 1933, reversing a decision of the Board of Tax Appeals (R. 45).

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16–29) is reported in 23 B.T.A. 838. The opinion of the Circuit Court of Appeals (R. 39–44) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 3, 1933 (R. 45). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the decedent's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 8–9.

STATEMENT

The facts found by the Board of Tax Appeals (R. 17–18) may be summarized as follows:

William B. Butterworth died a resident of Pennsylvania on October 5, 1921. By his will he disposed of certain personal belongings and left the residue of his estate to the respondents as trustees, with directions to pay over the entire net income from the property to his widow during her natural life. Provision was made for the disposition of the corpus of the estate after her death.

During 1924 and 1925 (the years here involved) the trustees paid the income to the widow pursuant

to the terms of the will. The amount thus distributed, together with amounts distributed to the widow in prior years, did not equal in the aggregate the value of the interest to which the widow would have been entitled had she elected to take against the will.

In computing the taxable income of the estate for the years involved the respondents deducted from gross income the amounts distributed to the widow. The Commissioner disallowed the deduction thus claimed and asserted deficiencies accordingly. The Board of Tax Appeals approved the Commissioner's action. The court below, with one judge dissenting, reversed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions were of income *qua* income and that the widow was with respect to these distributions a true beneficiary.

2. The Circuit Court of Appeals erred in holding that income, distributed by testamentary trustees to a widow who has elected to take under the will, is deductible by the trustees although it is not taxable to the widow, thus creating an exemption not contemplated by the revenue statutes.

3. The Circuit Court of Appeals erred in deciding that the amounts distributed by respondents to the widow in pursuance of the terms of the testamentary trust were deductible by the trustees.

4. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Circuit Court of Appeals in this and the three companion cases filed with this petition are in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Atkins* v. *Commissioner*, 63 F. (2d) 88. In that case a trustee was denied deductions for annual sums paid to a widow who had renounced her dower rights, and the decision was based upon the premise that the widow was a purchaser rather than a true beneficiary.

In *Warner* v. *Walsh*, 15 F. (2d) 367 (C.C.A. 2d), *United States* v. *Bolster*, 26 F. (2d) 760 (C.C.A. 1st), and *Allen* v. *Brandeis*, 29 F. (2d) 363 (C.C.A. 8th), it was held that payments to a widow from her deceased husband's estate, accepted by her in lieu of her dower or statutory rights in his estate, represent return of capital and not taxable income to the recipient. The court below apparently accepted the doctrine of these cases, and thus in effect held that neither the trustee nor the widow is liable for a tax in cases of this character, a conclusion which seems contrary to the clear purpose of the statutes to tax the income either to the trustee or to the beneficiary. Cf. *Eisner* v. *Macomber*, 252 U.S. 189, 203; *Irwin* v. *Gavit*, 268 U.S. 161, 166; *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, 235.

2. The decision of the Circuit Court of Appeals is erroneous if the decisions in the three Circuit

Court of Appeals cases just cited are correct. The Revenue Acts have been drafted with a view to taxing all income not expressly exempted. Estates and trusts are productive of taxable income and have been specifically included for tax purposes in the various revenue statutes since the adoption of the Sixteenth Amendment. The statutes disclose a consistent legislative intent to tax either the trustee or the beneficiary upon all taxable income distributed.[1]

In the three Circuit Court decisions of *Warner* v. *Walsh*, *United States* v. *Bolster*, and *Allen* v. *Brandeis*, *supra*, the Government sought to sustain the imposition of the tax as against the widow who had received the distributions. The courts held that this could not be done for the reason that the widow was in reality the purchaser of a capital asset and the distributions were nontaxable returns of capital, at least until the value of her statutory interest was recovered. The Treasury Department reluctantly accepted the principle announced by these cases and published rulings to the effect that such payments were nontaxable returns of capital up to the value of the property released, that the widow was thereafter to be "treated as any other income beneficiary," and that only then would the

[1] This has been repeatedly recognized in the decisions. *United States* v. *Bolster*, 26 F. (2d) 760, 763 (C.C.A. 1st); *Atkins* v. *Commissioner*, 63 F. (2d) 88, 89 (C.C.A. 1st); *Title Guarantee L. & T. Co.* v. *Commissioner*, 63 F. (2d) 621 (C.C.A. 5th); *Commissioner* v. *Freuler*, 62 F. (2d) 733, 734 (C.C.A. 9th).

fiduciary be permitted to deduct the payments made in computing the net income of the trust. I.T. 2506, VIII-2 Cumulative Bulletin 129; I.T. 2480, VIII-2 Cumulative Bulletin 141.

Although we know of no decisions by Federal courts contrary to the three Circuit Court of Appeals decisions cited above, we call attention to the decision of the Court of Appeals of New York in *People ex rel. Kight* v. *Lynch*, 255 N.Y. 323, 326, 327, which declined to apply the principle announced by the Federal courts to the construction of provisions of a State income-tax statute substantially similar in terms to the Revenue Act of 1918.

The decision of the court below, accepting as it does the doctrine of the cases above cited, nevertheless permits a deduction to the trustee. The decision seems to be rested upon the assumption that the statute has missed, to some degree, its declared purpose. Thus the court holds the income to be exempt although there is no language in the statute to indicate that an exemption was intended. Nothing is to be taken in favor of a claim of exemption by inference or implication. *Bank* v. *Tennessee*, 104 U.S. 493, 495; *Bank of Commerce* v. *Tennessee*, 161 U.S. 134, 146; *Cornell* v. *Coyne*, 192 U.S. 418, 431. *Heiner* v. *Colonial Trust Co.*, *supra*, p. 235.

3. The question is one of considerable importance in the administration of the revenue laws. It is one which arises under all of the taxing Acts. The Bureau of Internal Revenue informs us that there are now pending a large number of cases, involving

approximately one and one-quarter million dollars in taxes, the disposition of which depends upon the correct answer to this question. Furthermore, the Treasury Department is placed in a position which renders the proper administration of the revenue laws in cases of this character virtually impossible. The Government originally adopted the view that the distributions were taxable to the widows receiving them. This view was abandoned in deference to the authority of the three Circuit Court of Appeals decisions in *Warner* v. *Walsh*, *United States* v. *Bolster*, and *Allen* v. *Brandeis*, which were believed to settle the question. If the reasoning of the Third Circuit Court of Appeals in this and associated cases is correct, the income is apparently exempt as to both trust and distributee. If the views of the Fifth Circuit Court of Appeals [1] are correct, the widow is the proper taxpayer, and the three Circuit Court cases above cited are wrong. Until this confusion is resolved by a decision of this Court, the Treasury is unable to make satisfactory and equitable disposition of the many cases raising one aspect or the other of this problem.

Wherefore, it is respectfully submitted that this petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MAY 1933.

[1] *Title Guarantee L. & T. Co.* v. *Commissioner*, 63 F. (2d) 621, pending on petition for certiorari, No. —, October Term, 1932.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed

as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year (U.S.C., Title 26, Sec. 960).

Section 219 (a) and (b) (2) (U.S.C.App., Title 26, Sec. 960) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32, is identical with the corresponding provisions of the Revenue Act of 1924.

Purdon's Pennsylvania Statutes Annotated, Title 20, Decedents' and Trust Estates:

SEC. 31. *Widow's share in lieu of dower.*—The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law, so far as relates to land of which the husband died seised. * * * aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in lands of which the husband died seised. * * * (1917, June 7, P.L. 429, § 3.)

SEC. 261. *Spouse can elect to take against will.*—When any person shall die testate, leaving a surviving spouse who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate: * * * (1917, June 7, P.L. 403, § 23 [a].)

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 75

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, and Girard Trust Company, Trustees Under the Will of William B. Butterworth, Deceased

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 9–17) is reported in 23 B.T.A. 838. The opinion of the Circuit Court of Appeals (R. 21–26) is reported in 63 F. (2d) 944.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 3, 1933. (R. 27.) The peti-

tion for a writ of certiorari was filed May 17, 1933, and was granted May 29, 1933. (R. 27.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the decedent's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 27–28.

STATEMENT

The facts found by the Board of Tax Appeals (R. 9–10) were not controverted and are in substance as follows:

William B. Butterworth died on October 5, 1921. By his will he disposed of certain personal belongings and then provided as follows (R. 9):

> Third: All the rest, residue, and remainder of my estate, real, personal, mixed, whatever and wheresoever, I give, devise, and bequeath unto my trustees hereinafter named, in trust to invest and keep invested * * *, and to pay over the net income arising therefrom to my said wife,

> Julia Butterworth, for and during the full term of her natural life * * *.

Provision was made for the disposition of the corpus of the estate after the death of the widow. (R. 9.)

During 1924 and 1925 (the years here involved) the trustees paid the income to the widow pursuant to the terms of the will. The amount thus distributed, together with amounts distributed to the widow in prior years, did not equal in the aggregate the value of the interest to which the widow would have been entitled had she elected to take against the will. (R. 9–10.)

In computing the taxable income of the estate for the years involved the respondents deducted from gross income the amounts distributed to the widow. (R. 10.) The Commissioner disallowed the deductions thus claimed and asserted deficiencies accordingly. The Board of Tax Appeals approved the Commissioner's action. The court below, with one judge dissenting, reversed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions were of income as such and that the widow was with respect to these distributions a true beneficiary.

2. The Circuit Court of Appeals erred in holding that income, distributed by testamentary trustees

to a widow who has elected to take under the will, is deductible by the trustees although it is not taxable to the widow, thus creating an exemption not contemplated by the revenue statutes.

3. The Circuit Court of Appeals erred in deciding that the amounts distributed by respondents to the widow in pursuance of the terms of the testamentary trust were deductible by the trustees.

4. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

The Treasury Department at first endeavored to maintain the position that distributions made to a widow who elected to take under the will in lieu of her dower or statutory interests in the estate of her deceased husband was taxable to her. Decisions to the contrary were, however, reached in *Warner* v. *Walsh,* 15 F. (2d) 367 (C.C.A. 2d), *United States* v. *Bolster,* 26 F. (2d) 760 (C.C.A. 1st), and *Allen* v. *Brandeis,* 29 F. (2d) 363 (C.C.A. 8th). In deference to these decisions, the Government receded from its earlier position and announced its acceptance of the principle of these cases. The Treasury ruled, however, that if the widow was not taxable on such distributions of income, the trustee was. The endeavor to maintain the position so taken has given rise to the present cases.

II

If the widow is not taxable on the payments until her "capital" has been returned in full, the trustee should not be allowed to deduct the payments made to her as "income" distributed to a "beneficiary". The purpose of Congress in enacting Section 219 of the Revenue Acts of 1924 and 1926 (*infra,* p. 27) seems plain. All income accruing to property held in trust is made subject to tax. This tax is payable primarily by the trustee but in certain circumstances, when the beneficiary is subject to tax, the trustee is authorized to deduct from its taxable income the amount of income which is taxable to the beneficiary. This purpose should not be thwarted unless the reasons are compelling.

It seems apparent that Congress did not intend to create an exemption in favor of income distributed to widows. This Court has frequently announced the rule that nothing is taken by inference or presumption in favor of an exemption. Moreover, when the statute as an entirety is considered, there is no escape from the conclusion that Congress did not intend to provide for deductions by the trustee under the circumstances here disclosed.

We contend that the court below gave too broad a construction to the word "beneficiaries" in the statute. The wording of the statute as a whole makes it plain that Congress intended the word "beneficiaries" to include only those who not only

received distributions of trust property but who also are subject to tax on these distributions. This construction has been specifically adopted by this Court in *Burnet* v. *Whitehouse,* 283 U.S. 148, 151. Any other construction of the word would make a portion of the statute unconstitutional, for Congress has provided that payments deducted by the trustee "shall be included in computing the net income of the beneficiaries." If the payments in question are returns of capital and not income, Congress had no constitutional power to provide that they should be taxed to the recipient. To accept the broad construction of the word "beneficiaries" adopted by the court below is, therefore, to make this portion of the statute unconstitutional. The narrow construction of the word, confining it to those in whose hands the payments are taxable, is not only possible here but was obviously intended by Congress.

III

Although we contend that if the payments in question are not taxable to the widow they cannot be deducted by the trustee, we submit that the position originally taken by the Treasury was correct, and that the payments should be held taxable to the widow. Since the decisions of the three Circuit Courts of Appeals which rejected the Government's contention that the widow was taxable, two other courts have considered the same question and have reached the conclusion that the Government's

original position was correct. *People ex rel. Kight* v. *Lynch,* 255 N.Y. 323; *Title Guarantee Loan & Trust Co.* v. *Commissioner,* 63 F. (2d) 621, now pending as *Helvering* v. *Title Guarantee Loan & Trust Co.,* No. 78, present Term.

We submit that the decisions in these two cases are sound. The widow does not "purchase" in any true sense; she "elects." Moreover, even if she is regarded as a purchaser, what she has purchased is an equitable life estate in property, and the income from that estate should be held taxable to her just as would be the income from any other property she might have purchased.

If this contention is sustained, it follows as a consequence that the trustee is entitled to deduct the payments made and that the result of the decision below is correct, at least if the widow does in fact pay the tax on the income she receives.

ARGUMENT

This and the companion cases, Nos. 76, 77, and 78, present the question of the proper interpretation of Section 219 of the Revenue Acts of 1924 and 1926, as applied to cases arising where trust distributions are made to a widow who elects to take under the will of her deceased husband in lieu of dower or statutory rights. The courts in each of these cases have held that the trustee is entitled to a deduction in respect of such distributions.

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I

PRELIMINARY STATEMENT

The Treasury Department at first endeavored to maintain the position that distributions made to a widow who elected to take under the will in lieu of her dower or statutory interests in the estate of her deceased husband were taxable to her. This course was believed to conform to the decision of this Court in *Irwin* v. *Gavit*, 268 U.S. 161. It was the view to which the District Court subscribed in *Warner* v. *Walsh*, 10 F. (2d) 155 (D. Conn.).

In the *Warner case* a large trust fund was created under the will of the taxpayer's deceased husband, from which she was to receive $50,000 per year for life, payable out of income and if necessary out of principal. This provision was made and accepted by the widow in lieu of her statutory rights in her husband's estate under the laws of Connecticut. She paid Federal income tax on the sums distributed in each of the years 1917 and 1918 and subsequently brought suit to recover this tax. The Circuit Court of Appeals, reversing the court below, held that the widow should be treated as the purchaser of annuities by the relinquishment of her statutory rights in her husband's estate and that no tax should be collected from her until the aggregate annual payments equalled the purchase price (15 F. (2d) 367 (C.C.A. 2d)). The basis of the court's decision appears in the following quotation from its opinion (p. 368):

> * * * For what we have here is, in fact and in legal effect, the purchase of an annuity, in no way differing from an annuity purchasable by the widow from an insurance company, with the proceeds of her statutory rights in the estate, except only that in such a purchase she would have an unsecured obligation, whereas here the obligation is secured by the income and principal of the trust fund. That such a relinquishment of dower rights is a purchase of the will provision is well and long established. * * *[1]

These views were followed in *United States* v. *Bolster*, 26 F. (2d) 760 (C.C.A. 1st), where a surviving widow received substantial distributions of income under the will of her deceased husband, the provision being made and accepted by her in lieu of her dower rights under Massachusetts law. The annual payments in the *Bolster case* were not annuities but the Court nevertheless applied the rule laid down in *Warner* v. *Walsh, supra,* and held that

[1] The Circuit Court of Appeals for the Second Circuit has recently had occasion to determine the taxable status of distributions to the same widow which were made after the value of her surrendered dower rights had been fully returned. *Warner* v. *Commissioner*, decided July 17, 1933, not yet reported but may be found in 333 C.C.H. 9169. These payments were held to be exempt as having been acquired by bequest. While the court indicated that its earlier decision in *Warner* v. *Walsh* was not overruled, it is believed the reasoning of that case has not been carried to its logical conclusion in the more recent decision. The Government has filed a petition for certiorari in that case No. 499, October Term, 1933.

the widow was the purchaser of the annual payments to the extent of the value of her statutory interests in her husband's estate as of the date of his death.

This position was further supported by *Allen* v. *Brandeis*, 29 F. (2d) 363 (C.C.A. 8th). In that case the decedent provided for an annual payment of $50,000 to his wife for life in lieu of her statutory interest in his estate. This sum was payable from income and subject to diminution in the event of insufficient current income. The widow elected to take under the will. The court, following *Warner* v. *Walsh* and *United States* v. *Bolster*, both *supra*, held that the widow purchased the annual payments by relinquishment of her statutory interest in her husband's estate and that she should not be required to pay income tax on the annual payments received until the capital invested in the annuities had been returned to her.

In deference to the uniform authority of three decisions of as many Circuit Courts of Appeals, the Government reluctantly receded from its earlier position and announced its acceptance of the principle of these decisions in two rulings of the Treasury Department.[2] The Treasury ruled, however, that if the widow was not taxable on such distributions of income the trustee was. The endeavor to enforce the position so taken has given rise to the present cases.

[2] I.T. 2506, VIII–2 Cumulative Bulletin 129; I.T. 2480, VIII–2 Cumulative Bulletin 141.

II

IF THE WIDOW IS NOT TAXABLE ON THE PAYMENTS UNTIL HER "CAPITAL" HAS BEEN RETURNED IN FULL, THE TRUSTEE SHOULD NOT BE ALLOWED TO DEDUCT THE PAYMENTS MADE TO HER AS "INCOME" DISTRIBUTED TO A "BENEFICIARY"

The earliest income tax act did not recognize a trustee as a "taxable person." *Smietanka* v. *First Trust & Savings Bank*, 257 U.S. 602. This defect was remedied in the Revenue Acts of 1916 and 1917 (*Merchants Loan & Trust Co.* v. *Smietanka*, 255 U.S. 509), and by the time the Revenue Act of 1924 was enacted the provisions relating to estates and trusts had been developed into a comprehensive scheme, the obvious purpose of which was that all income received by estates and trusts should be subject to tax. Section 219 (a) of the Revenue Acts of 1924 and 1926 (*infra*, p. 27) specifically provides that the income tax provisions—

> shall apply to the income of estates or of any kind of property held in trust, including—
>
> * * * * *
>
> (2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *;

Section 219 (b) of both Acts provides that in such cases—

> the tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary. The net income of the

> estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—
>
> * * * * *
>
> (2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.

The purpose of Congress in enacting this provision seems plain. All income accruing to property held in trust was made subject to tax. This tax was payable primarily by the trustee but in certain circumstances, when the beneficiary was subject to tax, the trustee was authorized to deduct from its taxable income the amount of income which was taxable to the beneficiary. This purpose should not be thwarted, we contend, unless the reasons are compelling.

If we accept as correct the principles announced in *Warner* v. *Walsh, United States* v. *Bolster,* and *Allen* v. *Brandeis, supra,* the income from trust property paid to a widow who elects to take an interest in the trust in lieu of her dower or statutory interest is either taxable in the hands of the trustee, or else it is altogether exempt. It seems apparent that Congress did not intend to create an exemp-

tion in favor of income distributed to widows. Estates and trusts realize income and they have for many years been consistently subjected to tax. Section 219 of the Revenue Act of 1924 was materially changed from the corresponding provisions in the earlier act for the express purpose of preventing the escape of trust income from taxation.[3] Congress expressly provided that income payable to certain classes of beneficiaries, such as charitable organizations, should be exempt.[4] But there is no language in the statute which in any way suggests that income payable to widows is similarly exempt. This Court has frequently announced the rule that nothing is to be taken by inference or presumption in favor of an exemption. *Bank of Commerce* v. *Tennessee,* 161 U.S. 134, 146; *Heiner* v. *Colonial Trust Co.,* 275 U.S. 232, 235; *Pacific Company* v. *Johnson,* 285 U.S. 480.

In reaching its conclusion, the court below disregarded the fact that deductions permitted to trustees are but part of a harmonious plan devised to insure the payment of taxes on all income. The deduction provisions, we submit, must be applied in the light of that plan and any construction which would tend to defeat the purpose of Congress should

[3] House Report No. 179, 68th Cong., 1st Sess., p. 31; Senate Report No. 398, 68th Cong., 1st Sess., p. 25.

[4] Revenue Act of 1918, Sec. 219 (b) (2); Revenue Act of 1921, Sec. 219 (b) (2); Revenue Act of 1924, Sec. 219 (b) (1); Revenue Act of 1926, Sec. 219 (b) (1); Revenue Act of 1928, Sec. 162 (a); Revenue Act of 1932, Sec. 162 (a).

be avoided. When the plan as an entirety is considered there is no escape from the conclusion that Congress did not intend to provide for deductions under the circumstances here disclosed. The deductions allowed to trustees under Section 219 (b) (2) (*infra*, p. 27) are declared by the statute to be additional deductions, and we submit that they may be taken by the trustees only on the condition that the liability for the tax is transferred with the payments.

In its effort to justify a result which is obviously out of harmony with the fundamental purpose of the statute, the court below gave the word "beneficiaries" its most comprehensive meaning. The court held in effect that any person who receives distributions from a trust is a "beneficiary" within the meaning of the statute. (R. 26.) We contend that this construction is too broad. This Court has repeatedly recognized that words must be construed in the light of the setting in which they appear. *Towne* v. *Eisner*, 245 U.S. 418, 425; *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 433. We submit that the wording of the statute as a whole makes it plain that Congress intended the word "beneficiaries" to include only those who not only receive distributions of trust property but who receive the distributions as income, taxable as such.

This Court has already adopted the construction of the word "beneficiaries" for which we contend. In *Burnet* v. *Whitehouse*, 283 U.S. 148, it was held

that annuity payments under a will were not taxable to the recipient because the payments were a bequest. In answering the Government's contention that Section 219 made the payments taxable as "income which is to be distributed to the beneficiaries periodically," this Court said (p. 151):

> But clearly enough, we think, this section applies only to income paid as such to a beneficiary.

The widow is not a "beneficiary" of the trust if the payments to her must be regarded as returns of capital; she is a "purchaser," receiving what she has purchased in installments. Congress has expressly provided that the amount allowed as a deduction to the trustee "shall be included in computing the net income of the beneficiaries." But if the recipient of the payment is held to be a "purchaser," the amount received is a return of capital and not income, and Congress had no constitutional power to provide that it should be taxed to the recipient. To accept the broad construction of the word "beneficiaries" adopted by the court below, is therefore to make this portion of the statute unconstitutional. Under these circumstances we submit that the words of the statute must be given a construction which would make it constitutional. *United States* v. *Bennett*, 232 U.S. 299. Such a construction, confining the word "beneficiary" in this phrase of the statute to those in whose hands the payments are taxable, is not only possible here, but was obviously intended by

Congress. When the same word was used earlier in the same sentence in providing that the trustee might deduct payments made to "beneficiaries" we submit that it was intended to have the same construction. It follows, therefore, that the payments to "beneficiaries" which the trustee is authorized to deduct under Section 219 are limited to payments which are made to persons in whose hands the payments are subject to tax.

Our contentions as to the proper construction of Section 219 are directly supported not only by this Court's opinion in *Burnet* v. *Whitehouse, supra,* but also by the decision of the Circuit Court of Appeals for the First Circuit in *Atkins* v. *Commissioner,* 63 F. (2d) 88, which involved the same question as that now before this Court, and was decided in favor of the Government. The court there said (p. 89):

> We think it is apparent from a reading of the provisions of section 219 (a) (2), (b) (2), that Congress did not intend the net income of a trust should escape taxation either in the hands of trustees or in the hands of the beneficiary; that, to the extent that the net income was to be distributed currently to beneficiaries, it was to be taxed to the beneficiaries and a deduction allowed to the trustees in computing their net taxable income, but that, to the extent that distributions were not made to a beneficiary but to a

> purchaser for value, such distributions were not to be deducted in computing the net taxable income of the trust.

The evident intention of Congress to tax the income either to the fiduciary or the beneficiary had indeed been earlier recognized by the same court in *United States* v. *Bolster, supra,* in which the Government sought to collect the tax from the beneficiary. The court there said (p. 763):

> In the instant case we do not have to consider the possibility of the government losing its rightful tax upon income which Congress intended should be taxed. It is not a question of a statute "failing to hit" something which ought to be taxed. Under the statute with which we are dealing a trust is the subject of taxation just as an individual. We think the government must look to the trustee for its tax, and that the trust would clearly be taxable upon this income, if it were not expressly exempted because of its charitable character.

No controversy exists with respect to the classification of the income in question as income in the hands of the trustees. What they seek is a deduction. But the statute permits a deduction only on condition that the one to whom the income is paid shall be responsible for the tax. Since the income of the trust in this case was paid to individuals who are held not accountable for the tax, the condition of the statute is not satisfied and the deduction should be denied.

III

SHOULD THE WIDOW BE HELD TO BE A "PURCHASER" OF THE PAYMENTS SHE RECEIVES?

As has been pointed out, the Government's original position in cases of this class was that the payments of income to the widow were taxable to her and that the trustee was accordingly entitled to a deduction. When the decisions of three Circuit Courts of Appeals did not afford a conflict which could be brought before this Court the Treasury Department was forced to abandon the position it had originally taken. Our contention is, that if the payments are not taxable to the widow, they cannot be deducted by the trustee. But we also submit that the position originally taken by the Treasury was correct, and that the payments should be taxable to the widow. If the Government's original position in this respect was correct, then it follows, of course, that the trustee is entitled to deduct the payments made and that the result of the decision below is correct, at least, if the widow has in fact paid the tax on the income she received.

Since the decisions of the three Circuit Courts of Appeals which rejected the Government's contention that the widow was taxable, two other courts have considered the same question and have reached the conclusion that the Government's original contention was correct. In *People ex rel. Kight* v. *Lynch*, 255 N.Y. 323, the Court of Appeals of New York had before it the question whether

a widow was entitled to a refund of taxes paid on income received from a trust created by her husband's will on the ground that she was a purchaser of the payments. The provisions of the New York State income tax law were identical with those of Section 219 of the Revenue Act of 1924. The court held that the widow was not a purchaser and that she was taxable. The decisions of the three Circuit Courts of Appeals were cited and their conclusion was rejected. The reasoning of the court seems to us so conclusive that we adopt it and present it here as our argument on this question. The court said (pp. 326–328):

> Assuming that Mrs. Kight, in this case, had elected to take her dower instead of under the will, what would be her position and right as well as obligation under the Income Tax Law? If she took a specific piece of real property, which was laid off and admeasured to her, the rents or income from this property would be income, not payments as part of her principal, and would have to be included in the tax return as taxable income. The same ruling would apply if Mrs. Kight received one third of the rental value of the real property annually and for life. These rents would not change their nature from income to principal simply because they were paid to a widow as dower. So, likewise, if she elected to take a gross sum, as the value of her dower life interest, the income from the investment of this money would still be income taxable

under the law. In a word, the income which a widow receives on her dower interest, whichever way she takes it, is income taxable under the law, and not a capital payment in any sense.

What does the widow do, therefore, when she elects to take an income provision from a trust under the will of her late husband? She gives up one taxable income for another income, be it more or less. By what process of reasoning does her election of the substitute income relieve her from the duty to pay a tax or turn the selected income into a capital payment or a purchased annuity? As a fact, and not as a fiction, the income from one third of the deceased's real estate, constituting dower, is the same income in nature, perhaps also in amount, as the income from one third of that estate held in trust for her. This being so, we do not see any reason for exempting from taxation one income and not the other. The Tax Law creates no such exemption.

Neither is it accurate to say that the widow, in giving up her dower, purchases an income or an annuity from the estate. She purchases nothing; she makes an election allowed by law. (Real Prop. Law, § 200.) The estate does not sell, neither does she buy. The statement in *Flynn* v. *McDermott* (183 N.Y. 62), that "a bequest in lieu of dower, and the acceptance of same, amounts to a matter of contract and purchase," means in its application that as dower precedes legacies so should her elec-

tion. The paragraph is not relevant here. When she makes her election she knows, or is presumed to know, that the income which she considers taking under the will is taxable. She does not have to take it; she may reject it; but in considering her election, she is presumed to know that by section 365 of the Tax Law a tax is paid annually on income from any kind of property held in trust, and is to be paid by the beneficiary.

Another consideration moves us. The inchoate right of dower, as heretofore existing, has been abolished, with certain exceptions, and the widow is given, in the absence of a will, one half or one third of the estate outright. A will cannot deprive her of this portion which the law provides for her, but in case of a will, she now has numerous elections. (Laws of 1929, ch. 229, amending the Decedent Estate Law, the Surrogate's Court Act, the Real Property Law, the Civil Practice Act, and the Personal Property Law, generally, in relation to decedents' estates, taking effect September 1, 1930.) Surely, every election made by a widow under this law would not metamorphose income into principal.

That the income from this trust estate is not exempt as a gift or bequest, see *Irwin* v. *Gavit* (268 U.S. 161), which strongly indicates that income remains income, under the Federal Income Tax Act, until it clearly appears to be a return of a capital payment, or the payment of a bequest in installments.

> The same thought follows in *Jones* v. *Commrs. of Inland Revenue* ([1920] 1 K.B., p. 711).

The same conclusion was also reached in *Title Guarantee Loan & Trust Co.* v. *Commissioner,* 63 F. (2d) 621, which is now pending before this Court as *Helvering* v. *Title Guarantee Loan & Trust Co.,* No. 78, present Term. The question involved in that case was the same as here, namely, whether the trustee was entitled to deduct from its income payments made to a widow who took her interest in the trust in lieu of dower. The court held that the trustee was entitled to the deduction, but based its conclusion on its holding that the income in question was taxable to the widow. The court said (pp. 622–623):

> We think Mrs. Woodward is a beneficiary, in the trust, receiving the net income therefrom as income, the tax on which is chargeable to her and not to the trustee. The term "beneficiary" is broadly used in the statute as a correlative to fiduciary, and includes those who are the usees in the trust. What was paid Mrs. Woodward was paid her not in discharge of any monetary obligation due by the trust, but as her share along with her children in its profits. We agree with the multitude of authorities cited in *Re Butterworth,* 23 B.T.A. 838; *United States* v. *Bolster,* 26 F. (2d) 760; and *Allen* v. *Brandeis,* 29 F. (2d) 363, that at the death of her husband this widow had a legal estate in dower in his lands and an undivided one

fourth legal interest in his personalty, and the will in effect made an offer to purchase these from her in consideration of what it gave her; and that in electing to take under the will she took as a purchaser for value and not as a volunteer. But we think the *Bolster Case* and that of *Butterworth* based on it did not sufficiently consider what the widows there involved got; not a money obligation, but an estate in an investment. Had Mrs. Woodward retained her dower in the realty and her fourth interest in her husband's securities, she would have owed taxes on the income she received from them. She exchanged those legal estates for an equitable estate in substantially the same property, but managed for her by a trustee, which she thought preferable. She has changed the form of her investment, but the income from it is still income and paid to her as such by the very words of the will to which she assented. She has no charge on, or debt against, the trust estate. For the sale of her legal rights in her husband's estate she was paid in full by the equitable estate received under the will. Thereafter she was no creditor but the owner of that interest in property, exactly like the interest of each of her children, except that she paid for hers, and theirs presumably was given them. The case is otherwise when the widow sells her rights for money, whether paid in a lump sum, or in installments, or as an annuity. She is in such cases a creditor realizing on the conversion of her property into cash and

> entitled in general to receive her capital before what she gets becomes gain, and especially so when the getting of it is too uncertain to assign a present value to the obligation which she holds. *Burnett* v. *Logan,* 283 U.S. 404. In *Warner* v. *Walsh,* 15 F. (2d) 367, the widow sold her rights for an annuity. The same was true in *Allen* v. *Brandeis,* 29 F. (2d) 363. But in the case at bar there was no sale for a money-measured price, but an exchange of legal estates for an equitable estate in an investment. What comes from it as income is income to Mrs. Woodward and not capital, just as it is income and not bequest to her children. *Irwin* v. *Gavit,* 268 U.S. 161; *Heiner* v. *Beatty,* 17 F. (2d) 743, affirmed 276 U.S. 598.

Although the court below expressly refused to decide the question whether the widow was taxable, there is much in its opinion (see R. 24–25) which indicates its agreement with the views expressed by the Court of Appeals of New York and by the Circuit Court of Appeals for the Fifth Circuit in the opinions which have been quoted above. We contend that the question whether the widow is taxable is necessarily involved in this case and cannot be avoided as the court below endeavored to do. If our argument in Point II (*supra,* pp. 11) is sound, then the trustee is not entitled to the deduction unless the widow is taxable, so that the question whether the widow is taxable must be decided before it can be determined whether the trustee may deduct the payments.

We submit that the reasoning advanced in the quotations set out above is sound. The widow does not "purchase" in any true sense; she "elects."[5] If, for example, she chose to take her dower interest instead of an interest in the trust created by her husband's will, no one would suggest that she was a "purchaser" of her dower in the contract sense. Moreover, even if she is regarded as a purchaser, it cannot be overlooked that what she has purchased is an equitable life estate in property. If she had purchased bonds, she plainly would be taxable on the income from those bonds. No one could successfully contend that the interest should be free from tax until the payments in the course of time aggregated the amount paid for the bonds. The fact that she may be regarded as a purchaser of her equitable interest in the trust property is no reason why she should not be subjected to taxation on the income produced by that interest in property.

Accordingly, we submit that it should be held that the widow is taxable on the payments she receives in cases such as this. If this contention is correct, it follows as a consequence that the trustee may deduct the payments so made, at least if the widow does in fact pay the tax on the income she receives.

---

[5] Cf. Section 804 of the Revenue Act of 1932 which provides for purposes of the estate tax that "a relinquishment * * * of dower" or similar interest "shall not be considered to any extent a consideration 'in money or money's worth.'"

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed, unless it be concluded that the income in question is taxable in full to the widow.

Respectfully submitted.

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OCTOBER 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or dis-

tributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year; * * *. (U.S.C., Title 26, Sec. 960.)

Section 219 (a) (2) and (b) (2) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U.S.C.App., Title 26, Sec. 960), is identical with the corresponding provisions of the Revenue Act of 1924.

Purdon's Pennsylvania Statutes Annotated, Title 20, Decedents' and Trust Estates:

SEC. 31. *Widow's share in lieu of dower.*—The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law, so far as relates to land of which the husband died seised; * * * aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in lands of which the husband died seised. * * * (1917, June 7, P.L. 429, § 3.)

SEC. 261. *Spouse can elect to take against will.*—When any person shall die testate, leaving a surviving spouse who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate: * * * (1917, June 7, P.L. 403, § 23 [a].)

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IN THE

Supreme Court of the United States

No. 75. **October Term, 1933.**

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH and GIRARD TRUST COMPANY, Trustees Under the Will of WILLIAM B. BUTTERWORTH, Deceased,
Respondents.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

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v.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, AND GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF WILLIAM B. BUTTERWORTH, DECEASED,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 9-17) is reported in 23 B. T. A. 838. The opinion of the Circuit Court of Appeals (R. 21-26) is reported in 63 F. (2d) 944.

STATEMENT OF THE CASE.

The petitioner's Statement of the Case is correct, except that he does not state that the widow, by writing executed, filed and recorded as required by the Statutes of Pennsylvania, elected to take under the will in lieu of the share allowed her in decedent's estate by the law of Pennsylvania. The applicable statutes of Pennsylvania are set forth in the Appendix, *infra*, p. 13.

THE PERTINENT STATUTORY PROVISIONS.

Income taxes for the years 1924 and 1925 are involved, which are governed by Section 219 of the Revenue Acts of 1924 and 1926 (this Section is identical in both Acts), as follows:

> "Sec. 219(a). The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including——
>
> (2) Income which is to be distributed currently by the fiduciary to the beneficiaries. . . .
>
> (b) . . . the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that——
>
> (2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries . . . but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not."

SUMMARY OF ARGUMENT.

1. The statute expressly allows trustees to deduct income of the trust distributed currently to beneficiaries in computing the net taxable income of the estate or trust. The Board of Tax Appeals found that respondents distributed trust income to the widow during the years in question (R. 9); therefore the statute permits them to deduct such distribution in computing the net taxable income of the estate or trust. The allowance of the deduction is not dependent upon the liability of the widow to pay a tax on the income.

2. The widow is a beneficiary of the trust and her status as such is not changed by the fact that she takes by purchase in the sense of the law of acquisition as distinguished from the law of inheritance, by virtue of her election to take under the will instead of her statutory dower.

3. The question of whether the widow is taxable does not arise in this case, as is pointed out by the Court below (R. 23). The only question before the Court is whether the trustees are entitled to deduct the income distributed to the widow in computing the net taxable income of the estate or trust.

ARGUMENT.

1. The Statute Expressly Allows the Deduction of Trust Income Distributed Currently to Beneficiaries, Regardless of Whether the Beneficiaries Pay Tax Thereon.

The Government concedes in its brief (p. 17) that the income in question is income in the hands of the trustees. The statute expressly allows trustees to deduct income distributed currently to beneficiaries, and the Board found that such income was so distributed to the widow (R. 9). The Government argues, however, that the deduction may be made by the trustees "only on the condition that the liability for the tax is transferred with the payments" (p. 14) or "on condition that the one to whom the income is paid shall be responsible for the tax" (p. 17). The terms of the statute are a complete answer to this argument.

The concluding clause of Section 219 (b) (2) provides, "but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries, whether distributed to them or not." The obvious answer to the Government's contention is that the grammatical arrangement of the paragraph in question precludes the Government's construction. The paragraph opens with a declaration that currently distributed income of the estate or trust shall be allowed as a deduction. The concluding clause on which the Government relies does not imply that if the income distributed to the beneficiaries is not included in computing the beneficiaries' net income, it shall not be allowed as a deduction. On the contrary the concluding clause provides "but the amount so allowed as a deduction

shall be included in computing the net income of the beneficiaries." This can only mean that the deducted income be included in computing the net income of the beneficiaries, and it is apparent that the concluding clause was inserted in order to make sure that the beneficiaries who receive currently distributed income from a fiduciary would return it for tax, if taxable. The concluding clause was directed at the beneficiaries and not at the estates. It was not intended to qualify the earlier clause and to place any limitations on the deduction allowed by the earlier clause, so far as the estates and trusts are concerned. If the concluding clause had read—"provided the amount so allowed as a deduction is included in computing the net income of the beneficiaries," there might be some ground for the Government's contention, but it is impossible to construe the clause as though it reads that way. "In Statutes levying taxes the literal meaning of the words employed is most important, for such Statutes are not to be extended by implication beyond the clear import of the language used"—*United States v. Merriam*, 263 U. S. 179, 187.

Another reason why the Government's contention is unsound is because of the use in this clause of the imperative words "shall be included in computing the net income of the beneficiaries." The fiduciaries under the law have nothing to do with the payment of tax by beneficiaries or computation of their net incomes. The only duty of the fiduciaries is to make a return and pay the tax due, whatever it may be, on the trust estates' income. The computation of the beneficiaries' incomes and payment of tax thereon is a responsibility of the beneficiaries, and not of the fiduciaries. Consequently, a direction as to what shall be included in computing the net income of the bene-

ficiaries (for taxable purposes when and if any tax is payable on such income) such as the clause now being discussed, must be directed at the parties on whom the duty of computing such net income rests, namely, the beneficiaries. It is repeated that this clause cannot refer to the fiduciaries because they have nothing to do with the computation of the net income of the beneficiaries.

The court below correctly analyzes the provision of the statute now under discussion, as follows (R. 25):

> "It (the statute) said the fiduciary may deduct; not that he may deduct if or provided the income so deducted is taxable to the recipient. It distinctly did not say that he may not deduct if the income is not taxable to the recipient. In other words, the right of deduction which the Congress gave a trustee was not conditioned upon the taxability of the beneficiaries. The grant, by its terms, was absolute. Or, we may assume for purposes of discussion, and with entire respect, that the Congress did not know the law of the three cited cases until the Circuit Court of Appeals declared it. In that event the Congress made no provision for such a situation. It follows that in either case, knowing the law or not knowing the law, the Congress declared the way in which income from a trust estate should be computed and gave, without excepting the situation in this case and without any like limitation, a right to a fiduciary to deduct distributed income from gross income in making income-tax returns, and provided, accordingly, who should pay the tax. As that right was conferred upon a trustee by words of the statute which, standing apart from the three cited decisions, are so plain as not to admit of construction, we hesitate to withdraw the right by giving the words of the Congress a meaning different from what its words import merely because the Government will, unless this is done, lose revenue from a source of which it has not availed itself."

The Government also argues (p. 12) that the purpose of Congress was to tax all trust income. Even conceding this to be so, it does not follow that the respondent trustees should be denied the deduction expressly allowed because the recipient of that income does not pay a tax thereon. The respondents are not claiming an exemption, as contended by the Government at page 13 of its brief, but the right to a deduction. The statute provides that trusts shall be taxable on their income, and defines how that income shall be computed, specifying certain deductions. These deductions are not exceptions or provisos; they have appeared in all of the Income Tax laws. There have been many decisions on the question of whether or not deductions may be allowed as falling within the particular statute involved, and it has never been suggested that there is a presumption against the taxpayer in such cases. See *United States v. Woodward*, 256 U. S. 632; *Duffy v. Central R. R.*, 268 U. S. 55. Respondents are not claiming an exemption; they are claiming a deduction in computing their net income subject to tax and "the solution of the question turns entirely upon the statutory provisions"—*United States v. Woodward*, supra, at page 634. Thus in *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, a case where the question was whether a lessee of a mine could deduct depletion in computing its net income, this Court allowed the deduction, quoting with approval the following language of the Circuit of Appeals, page 370:

> "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

It is, of course, true that the burden is on the taxpayer who claims that the deduction was illegally disallowed—*Reinecke v. Spalding*, 280 U. S. 227—but that does not mean that the statutory provision allowing the deduction is to be construed strictly against the taxpayer.

In the case of *Smietanka v. First Trust & Savings Bank*, 257 U. S. 602, this Court held that the Income Tax Act of 1913 made no provision for taxing income held and accumulated by a trustee for unborn and unascertained beneficiaries. The Government in that case evidently made the same argument that is made in the instant case: that Congress intended to tax all income. This Court, however, said (p. 605):

> "It may be that Congress had a general intention to tax all incomes whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise the intention can not be enforced by the courts. The provisions of such acts are not to be extended by implication."

In the case last cited this Court commented (p. 606) on the fact that the Treasury Department did not attempt, for two years, to collect tax on income of the character involved in that case. The same comment may be made in the case at bar. The deductions claimed by respondents were allowed without question for several years, until after the decisions of the Circuit Courts of Appeals that the widow was not liable to tax. Thereafter the Commissioner changed the practice by IT 2480 and IT 2506, both published in 1929, as is pointed out by the Court below (R. 22), and on page 10 of the Government's brief.

For the foregoing reasons we submit that under the terms of the Statute the respondent trustees may deduct the income of the trust distributed to the widow in computing the net taxable income, regardless of the liability of the widow.

2. The Widow Is a Beneficiary Within the Meaning of the Statute.

The Government argues (p. 14) that the Court below construed "beneficiary" too broadly, and that Congress intended the word "to include only those who not only receive distributions of trust property, but who receive the distributions as income, taxable as such." There is nothing in the Statute to suggest that the word is used in this restricted sense. This Court recently had occasion to consider the same term as used in Sec. 219 (g) of the Revenue Act of 1924, in the case of *Reinecke v. Smith*, 289 U. S. 172, and Mr. Justice Roberts there said (p. 174):

> "A trustee is not subsumed under the designation 'beneficiary.' Both words have a common and accepted meaning—the former signifies the person who holds title to the res and administers it for the benefit of others; the latter the cestui que trust who enjoys the advantages of such administration."

This is in accordance with the Treasury Department's definition of the term "beneficiary" as used in Sec. 219, subdivisions (g) and (h) of the Acts involved, as quoted by the Court below in its opinion (R. 26).

In *Emma Louise Smith v. Commissioner of Internal Revenue*, 59 F. (2d) 56, the Circuit Court of Appeals for the First Circuit reversed the Board of Tax Appeals, the Board having adopted a narrow and restricted construc-

tion of the word "beneficiary" as used in Section 219 (g) of the Revenue Acts of 1924 and 1926. The Circuit Court of Appeals said, page 58:

> "The Board also took the view that the word 'beneficiary' in Section 219 (g) has reference 'to a present beneficiary of a trust, not to one who has only a remote possibility of becoming a beneficiary in the future,' and because the likelihood of Emelius W. Smith, the husband, ever taking a vested interest under the trust was remote, he was not a beneficiary. . . .
>
> It would seem that Congress did not intend, by the use of the term 'beneficiary' in Section 219 (g) only a beneficiary having a present vested interest, but intended to include within that term a beneficiary or beneficiaries having contingent interests as well as those having present or vested ones.
>
> Undoubtedly Congress could have drawn a line between beneficiaries holding vested and contingent interests, or between those having contingent interests based on their respective degrees of remoteness, but it has done neither of these things. It is, therefore, far more reasonable to conclude that by the word 'beneficiary' Congress intended to include persons or classes of persons designated, in the particular trust under consideration, entitled to take present or contingent interests thereunder."

The Government also argues, at page 15, that "the widow is not a 'beneficiary' of the trust if the payments to her must be regarded as returns of capital; she is a 'purchaser,' receiving what she has purchased in installments."

The argument is unsound because the payments to her cannot be regarded as returns of capital. She elected to take income and what is paid to her is income. The trustees cannot pay her anything else. They must pay her

income. The Will prevents them from paying her any part of the capital. If the trust produces no income the widow gets nothing. She cannot have any part of the capital because she elected to take income. See opinion below (R. 24). To imply that capital is "returned" to her is likewise fallacious, not only for the reasons above, but because she has never had any capital to be returned.

To say that "she is a 'purchaser' receiving what she has purchased in installments" is equally unsound. She has made no purchase in a contractual sense. She made an election and is only a purchaser as distinguished from one who takes by descent. Even if she be regarded as a "purchaser" by contract, she did not agree to take anything in installments. She elected to take the income, which is paid to her as received, and not in "installments."

The presumption is that the term "beneficiary" is used in the same sense throughout the Statute. *Pampanga Mills v. Trinidad,* 279 U. S. 211, 218; *Atlantic Cleaners & Dyers v. United States,* 286 U. S. 427, 433. To say that the term "beneficiary" does not include the widow in the instant case is to run counter to the rule of construction that "the legislature must be presumed to use words in their known and ordinary signification," *Old Colony R. Co. v. Commissioner,* 284 U. S. 552, 560, and that "the popular or received import of words furnishes the general rule for the interpretation of public laws," *Woolford Realty Co. v. Rose,* 286 U. S. 319, 327.

In *United States v. Bolster,* 26 F. (2d) 760, a widow who elected to take under the Will of her husband, was described as a beneficiary.

In *Gruver v. Wood,* 174 Mass. 540, the testator gave his widow a bequest in lieu of dower and the residue to the

"several beneficiaries under the will." The court affirmed a ruling by Chief Justice Holmes, saying (p. 541):

> "The only question is whether the widow is a 'beneficiary under this will,' within the meaning of the residuary clause. We think she is. It is true the legacy to her in the second item is given apparently in pursuance of the antenuptial contract, and in lieu of dower and of any other right she, as widow, might have in the personal estate of the testator, and that therefore, in case of a deficiency of assets, she would not be regarded as a 'mere' or 'pure beneficiary,' but would be entitled to a preference. Pollard v. Pollard, 1 Allen 490; Towle v. Swasey, 106 Mass. 100. Yet she receives something under the will, and in the natural and ordinary sense is a beneficiary, and we think the term was used by the testator in this sense."

We submit, therefore, that the term "beneficiary" as used in the Act of Congress includes a widow who receives income in lieu of dower.

3. The Question of the Liability of the Widow Does Not Arise.

As to the discussion in the brief of the Government, pages 18-25, in respect of the liability of the widow for income tax, the Court below having held that that question was not before it (R. 23), and the widow not being a party to the record, no further argument is presented by respondents on that question.

CONCLUSION.

The judgment of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted,

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JOHN HAMPTON BARNES,
Attorneys for Respondents.

APPENDIX.

Penna. Act of June 7, 1917, P. L. 403:

> Section 23. (a) When any person shall die testate, leaving a surviving spouse who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate. . . .
>
> (b) A surviving spouse electing to take under or against the will of the decedent, shall, in all cases, manifest the election by a writing signed by him or her, duly acknowledged before an officer authorized by law to take the acknowledgment of deeds, and delivered to the executor or administrator of the estate of such decedent within two years after the issuance of letters testamentary or of administration. Neglect or refusal or failure to deliver such writing within said period shall be deemed an election to take under the will.

Penna. Act of June 17, 1917, P. L. 429:

> Section 3. The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law, so far as relates to land of which the husband died seised; and her share in lands aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in lands of which the husband died seised. . . .

See Purdon's Penna. Statutes Ann. Title 20, Sections 31, 261, 262.

Supreme Court of the United States

OCTOBER TERM, 1933
No. 75

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH AND GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF WILLIAM B. BUTTERWORTH, DECEASED,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

Now come Burton E. Eames and R. Gaynor Wellings, counsel for The New England Trust Company, et al., Executors, Estate of Stillman P. Williams, petitioners in a proceeding against the Commissioner of Internal Revenue, Docket No. 44570, now pending before the United States Board of Tax Appeals, and say that the issue or issues in said case are the same as presented for determination by the case now before this Court and move for leave to file this brief as amici curiae in the case now at Bar.

Respectfully submitted,

BURTON E. EAMES,
R. GAYNOR WELLINGS,
Attorneys for The New England
Trust Company, et al., Executors.

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Respondents.

BRIEF OF AMICI CURIAE

OPINIONS BELOW.

Julia Butterworth, Henry W. Butterworth and Girard Trust Company, Trustees Under the Will of William B. Butterworth, deceased, v. *Commissioner of Internal Revenue,* 23 B. T. A. 838.

Butterworth, et al. v. *Commissioner of Internal Revenue, United States Circuit Court of Appeals for the Third Circuit,* 63 F. (2d) 944.

JURISDICTION.

This case is before this Court upon a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Third Circuit filed March 3, 1933 (R. 27), which decision reversed the judgment of the

United States Board of Tax Appeals entered June 29, 1931 (R. 17) which determined deficiencies in the respondents' income taxes for the years 1924 and 1925 in the respective amounts of $319.54 and $968.60 (R. 17). A petition was duly presented to this Court by the petitioner herein for a writ of certiorari, and order allowing the same was filed herein on May 29, 1933 (R. 27). The application for certiorari was made within three months after the filing of the judgment in the Circuit Court of Appeals as provided by Section 350 of the Judicial Code.

STATEMENT OF THE CASE.

The respondents are Executors and Trustees of the Estate of William B. Butterworth who died testate on October 5, 1921, while a resident of Pennsylvania (R. 9). By his will, dated March 18, 1910, the testator devised and bequeathed to certain trustees the rest and residue of his property in trust to invest the same and to pay the net income arising therefrom to his wife, Julia Butterworth, for the term of her natural life (R. 9). The will also made provision for the disposition of the corpus of this trust fund following the death of the deceased's widow (R. 9). In accordance with the statutes of Pennsylvania, the testator's widow duly elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania (R. 9). During 1924 and 1925 the Trustees made payments to the widow as provided for under the will, which amounts added to the payments of prior years did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutes had she not elected to take under the will (R. 9, 10). In filing returns for the years 1924 and 1925, the respondents as Trustees deducted from gross in-

come, for the purpose of ascertaining the taxable net income, the amounts distributed to the widow under the testamentary trust (R. 10). Thereafter the petitioner determined deficiencies in respondent's income tax for the years 1924 and 1925 (R. 9). These deficiencies resulted from the disallowance of the amounts paid the decedent's widow and which had been deducted by the respondents from gross income (R. 9). Thereafter the respondents duly filed their petition with the United States Board of Tax Appeals for a redetermination of said deficiencies (R. 2). After hearing, the United States Board of Tax Appeals, on June 23, 1931, decided that under Section 219 of the Revenue Act of 1924 the respondents were not entitled to deduct from gross income the amounts distributed to the decedent's widow and on June 29, 1931, the Board ordered and decided that there are deficiencies in the respondents' income tax for the calendar years 1924 and 1925 (R. 17). 23 B. T. A. 838. Thereafter, on December 21, 1931, the respondents duly filed a petition for review of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Third Circuit, (R. 17), which Court on March 3, 1933 entered a judgment reversing the decision of the United States Board of Tax Appeals (R. 27). 63 F. (2d) 944.

The parties are now before this Court upon a writ of certiorari which was granted by this Court on May 29, 1933 (R. 27).

SPECIFICATION OF ERRORS.

It is intended to urge in this case the following assigned errors:

(1) The United States Board of Tax Appeals erred in refusing to permit the respondents in computing the

net income of the trust, to deduct those amounts which they distributed to the decedent's widow in the calendar years 1924 and 1925.

(2) The United States Board of Tax Appeals erred in holding that the payments made by the respondents to the decedent's widow during the calendar years 1924 and 1925 were not payments of income.

(3) The United States Board of Tax Appeals erred in holding that the decedent's widow, to whom was given the income from the residuary estate of the decedent for her life, is not "a beneficiary" of his estate.

(4) The United States Board of Tax Appeals erred in rendering a decision for the petitioner.

STATUTES INVOLVED.

The following are the applicable provisions of the Revenue Act of 1924:

"SEC. 219 (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

* * *

(b) Except as otherwise provided in sub-divisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall

be computed in the same manner and on the same basis as provided in section 212, except that—

* * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

(3) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

Summary of Argument.

I. Section 219 (b) (2) of the Revenue Act of 1924 should be construed so as to permit the respondents in computing the net income of the trust to deduct those amounts which they distributed to the widow in the years 1924 and 1925.

II. The object of Section 213 (b) (2) of the Revenue Act of 1924 is defeated by the construction placed upon

Section 219 (b) (2) of that Act by the United States Board of Tax Appeals.

INTRODUCTORY STATEMENT.

When a widow accepts the provisions of her deceased husband's will and is paid the entire net income from his estate currently in lieu of her right of dower or her statutory share of the corpus of the estate, it has been held that such current payments are not taxable income to her before or until the aggregate amount of such payments equals and exceeds the value of the property she relinquished by accepting the provisions of the will. The reason given by the courts for this decision is that the payments to the widow are, in her hands, returns of capital, not income, and represent "purchase money" or "instalment payments" to the widow by the estate in consideration of her statutory or dower interest in the corpus of the estate.

Warner v. *Walsh*, 15 Fed. (2d) 367; (C. C. A. Second Circuit);

United States v. *Bolster*, 26 Fed. (2d) 760; (C. C. A. First Circuit);

Allen v. *Brandeis*, 29 Fed. (2d) 363; (C. C. A. Eighth Circuit).

On the other hand, the Income Tax Unit has ruled that income from property held by an estate or trust to be paid to a widow in lieu of her dower rights or statutory interest may not be deducted by the estate or trust until these income payments equal the value of her interest; and further, that *after* that time such payments should be deducted as ordinary income distributions in computing the net income of the estate or trust.

I. T. 2506, C. B. VIII-2, p. 129; *I. T. 2480*, C. B. VIII-2, p. 141.

The basis of these rulings seems to be the opinion that only those distributions of income by an estate or trust which under the taxing statutes "shall be included in computing the net income of the beneficiaries" are allowable as deductions in computing the net income of the estate or trust (*I. T. 2506*, C. B. VIII-2, p. 129, 130; *I. T. 2480*, C. B. VIII-2, p. 141, 144) and that such distributions do not include payments made to a widow prior to the time they equal the share of her dower or statutory interest in her deceased husband's estate.

The Board of Tax Appeals in the case at Bar has upheld the first of these rulings on the ground that the amounts paid to the widow were not distributions of income and that the widow is not a "beneficiary" within the meaning of Section 219 (b) (2) of the Revenue Act of 1924. 23 B. T. A. 838.

ARGUMENT.

I. Section 219 (b) (2) of the Revenue Act of 1924 should be construed so as to permit the respondents in computing the net income of the trust to deduct those amounts which they distributed to the widow in the years 1924 and 1925.

The language of Section 219 (b) (2) expressly allows such deduction to be made and is clearly opposed to the decision of the Board of Tax Appeals:

Section 219 (b) (2) provides:

> "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, . . . but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not . . . ."

From the plain language of this statute it must be apparent that we are not concerned in the immediate case with the nature of the payments once they have been made to the widow. Our question is preliminary to and distinct from any such question and has to do only with the taxability of the money received by the fiduciary as income from the securities held in the trust fund. The decision of that question should not, therefore, be influenced by what the courts have concluded to be the rights of the widow or by the fact that, unless the income of the trust in question is taxed to the fiduciary, it will escape taxation. It is a fundamental principle in the construction of statutes levying taxes that the literal meaning of the words employed is most important, for such

statutes are not to be extended by implication beyond the clear import of the language used.

United States v. *Merriam*, 263 U. S. 179, 187, 188.

Applying this principle to the language of Section 219 (b) (2), it cannot be held that the nature of the payments to the widow has any bearing on the taxability of such income. That it was evidently and obviously the intention of Congress that considerations which determine the taxation of beneficiaries were not to enter into the taxability of fiduciaries is manifested by the language used in that clause of Section 219 (b) (2) which provides "but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries". These words are addressed not to the fiduciaries but to the beneficiaries. They contain a direction to the distributees of the trust funds to include such payments in the computation of their tax. No direction whatsoever is made to the fiduciary by the language of this clause and as it must be remembered that the beneficiary and fiduciary are separate and distinct persons having separate and distinct responsibilities for the purposes of taxation, it seems clear that no direction was intended by Congress except in so far as the words *"but the amount so allowed as a deduction"* repeat the legislative intent to exempt a fiduciary from taxation whenever the income from the trust funds, which otherwise would be taxable to the Trustee, is currently distributed to the beneficiaries of the trust.

Furthermore, it should be noted that Congress did not express its intention in the above clause in terms of a proviso. The words used are *"but"* the amount so allowed . . . *"shall be"* included in computing the net income of the beneficiary and not *if* or *provided* or *on con-*

dition that such amount *is* so included. The language of the statute clearly provides it is enough that it is "income of the estate or trust" and is "distributed currently by the fiduciary to the beneficiaries". To give the language used the same meaning as would be given to other language not used is, it is submitted, not adhering to the rule of construction which governs the interpretation of statutes levying taxes. The word *"but"* does not in any way qualify the meaning of the language preceding it as would a word such as *provided*. Furthermore the words *"shall be"* are mandatory in import and, because the fiduciary is in no measure responsible for the return or tax of the beneficiary, must have been used by Congress for the purpose of imposing an obligation upon the beneficiary alone apart from the fiduciary.

Standing alone the meaning of the language of Section 219 (b) (2) can permit of no doubt. By it the estate or trust is clearly entitled to a deduction for the amount of the income from a trust fund paid to any beneficiary whoever the beneficiary may be and without regard to the taxable status of the beneficiary with respect to the income so paid. The case where it is paid to a widow in lieu of her dower or statutory rights is no exception so far as the language goes. The opinion of the United States Board of Tax Appeals, however, intimates that the payments made by the Trustees in this case were not of "income" and further states that said payments were not made to a "beneficiary" within the meaning of the Revenue Act of 1924. The Board in its opinion, (R. 15), says:

> "Section 219 of the Revenue Act of 1924, quoted above, deals with income. It taxes trust income primarily to the Trustees but it allows the Trustee to deduct the 'income . . . which is to be distributed cur-

rently by the fiduciary to the beneficiaries'. This provision in our opinion relates solely to amounts paid as income to the objects of the testator's bounty. It does not apply to other payments by the Trustee, as in this case where the Trustee was completing the offer made to the widow for the purchase of her share in the estate; the Trustee in such case was merely carrying out the 'convention or contract' (*Isenhart* v. *Brown, supra*) between the testator and his widow. The widow in such a case is in no sense a beneficiary, but, as held by the authorities above quoted, she is a 'purchaser for value'. The statute taxes to a beneficiary only 'income paid as such' (*Burnet* v. *Whitehouse,* 282 U. S.) and in our opinion contemplates the deduction by the Trustee only of income paid as such to a pure beneficiary as, for example, in the *Gavit* and *Beatty* cases, *supra.*"

It does not seem to be open to question that the payments to the widow were made out of "income" from the trust fund. The Circuit Court of Appeals in both *Warner* v. *Walsh* and *United States* v. *Bolster,* supra, in deciding that such payments were not taxable to the widow nevertheless recognized the fact that they were payments out of "income". At page 368 the Court in its opinion in the *Warner* case says that the obligation of the fiduciary to the widow "is secured by the *income** . . . of the trust fund." And again in the *Bolster* case the Court, at page 763, says:

> "In the instant case the ground of the exemption is, not that the *income** received is a bequest, but that such *income** is exempt, because it represents 'purchase money' or a return of capital."

---

*Italics ours.

In order to be taxable to the Trustees, the moneys received by them and from which the payments to the widow were made must have been "income" because by Section 219 (a) it is only "income . . . of any kind of property held in trust" that is taxable. Accordingly, if the payments to the widow were not made out of "income" of property held in trust, the taxing statute would have no application. That these payments were made out of "income" is also evident from sub-division (b) of Section 219 which provides that "the tax shall be computed upon the net income of the estate or trust, . . ." So that to be within this sub-division the payments must have constituted "income" to the fiduciary.

By its ruling (*I. T. 2506*, C. B. VIII-2, p. 129, 130) that, as soon as the payments to the widow equal the value of her dower right or statutory share of her deceased husband's estate, they become *ordinary* income and as such subject to tax, the Government recognizes this money to be income in the hands of the fiduciary. In the first place the ruling describes the income which is to be subject to tax to the widow as *ordinary* income. By this the Government must mean income which is taxable as distinguished from income which is not taxable. There is no basis in the statute for any such distinction. Whether it is taxable or not, however, it is nevertheless admitted to be income. Again, it is inconsistent to say that when received by the fiduciary it is income, but when paid to the beneficiary it is not. The character of these payments must first be determined either as income or not and then the statute applied to them. They have been found to be income and the Government cannot change their character from income to capital merely so that they shall not escape taxation.

Assume that a testator by his will established a trust fund for his widow in lieu of her dower or statutory rights and that before this fund was handed over by the executor to the trustee and during the period of administration or settlement of the estate the executor distributes to the widow the income received from the trust fund, would not the estate be entitled to a deduction of the income so distributed by Section 219 (b) (3) of the Revenue Act of 1924? Under the authority of *Riker* v. *Commissioner of Internal Revenue*, 42 Fed. (2d) 150, it would seem that such a deduction should be allowed. In that case the estate of the deceased was still unsettled and in the process of administration during the year 1923. For that year it filed an income return in which it included $33,000 of its income which had in fact been paid by the estate during that year to the residuary legatee. The Commissioner of Internal Revenue reduced the taxable income of the estate by that amount and created the deficiency involved by adding that sum to the taxable income of the residuary legatee.

The pertinent provisions of the Revenue Act of 1921 which controlled were as follows:

"Sec. 219 (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(c) In cases under paragraphs (1), * * * the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or

settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. * * *

(d) * * * in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, * * *"

The Court held that under Section 219 of the Revenue Act of 1921 the action of the Commissioner was proper and that the tax was properly assessed to the residuary legatee. In its opinion, at pages 150 and 151, the Court says:

"No one does, or could, consider the $33,000. as anything but income to the estate.

* * *

"Since the sum in controversy was properly paid by the estate to the ultimate beneficiary, though the testatrix had not expressly provided for the payment of income to him, it might have been deducted from the taxable income of the estate in accordance with subdivision (c) above. * * * We agree that the statute gave the estate permission only to make the deduction, and, if the words of the statute did not themselves amply show this to be so, would have an added reason for this conclusion in the fact that in 1924 Congress changed the law to make such a deduction compulsory. Revenue Act of 1924, section 219 (b) (3), 26 U. S. C. A., section 960 note."

The Court thus decides that the $33,000 received by the fiduciary was "income" to the estate without regard to what disposition was to be made of it by the estate and even though the will made no provision for the distribution of "income" to the residuary legatees. Furthermore, the Court points out that, although the Revenue Act of 1921 merely permitted the estate to make a deduction for the amount of income distributed, the Revenue Act of 1924 makes such a deduction compulsory. The Board of Tax Appeals had decided the above case in the same manner. *Hendricks* v. *Commissioner of Internal Revenue*, 16 B. T. A. 193.

Following this case, it would seem that in the case at Bar it should be ruled that the fund distributed was "income" in the hands of the fiduciary.

Accordingly, it is submitted that the payments to the widow were made out "of the income of the . . . trust" within the meaning of Section 219 (b) (2) of the Revenue Act of 1924. Therefore the respondents are entitled to a deduction of the amount of said payments *unless* they were *not* made "currently by the fiduciary to the beneficiaries" within the meaning of said Section 219 (b) (2).

Because, in the many decisions cited by the Board, a widow who elects to take under the will of her deceased husband and thus waives her dower or statutory interest in his estate has been held to be a "purchaser for value" to the extent of the value of the interest she has relinquished, the Board reaches the conclusion that a "widow in such a case is in no sense a beneficiary", or, at least, is not a "pure beneficiary" and, hence, the respondents are not entitled to deduct the payments made to her as "income of the . . . trust . . . distributed currently by the fiduciary to the beneficiaries" within the meaning of Section 219 (b) (2) of the Revenue Act of 1924 (R. 15).

It is earnestly submitted that such a construction of the word "beneficiary" in that section was never intended by Congress and is not justified by the authorities. It is a long and well established rule of construction that the language of statutes should be given its plain, ordinary and popular meaning, rather than a narrow, technical or strained definition.

Old Colony R. R. v. *Commissioner*, 284 U. S. 552, 560;

Woolford Realty Co. Inc. v. *Rose*, 286 U. S. 319, 327 and cases cited therein.

Neither the Board of Tax Appeals nor the petitioner denies the existence of a trust in this case. All the requisites of such a relationship being present, obviously, no such contention could be made. This being so, the testator's widow, who, under the terms of his will, is to receive the net income from the trust fund established thereby, must, in the ordinary, popular and natural sense of the word, be a "beneficiary". It is true that such a status may be attained in different ways,—that is, either through purchase by the beneficiary or through the gratuity of the settlor, but the fact remains that the cestui que trust in either case is a "beneficiary", as that word is commonly understood. To purchase a beneficial interest in a trust is not unusual. Many cases of such trusts have been before the Courts. For example, in those cases where "Massachusetts Trusts", so-called, which are organizations created by trust agreements, whereby property is conveyed to and managed by trustees and the income is distributed to the cestuis, whose interests in the trust are represented by transferable certificates, have been before the Supreme Court of the United States, the holders of the certificates are termed

"beneficiaries". It is well known that such certificates are most often acquired by purchase, but, nevertheless, in *Crocker* v. *Malley*, 249 U. S. 223, in which it was held that such an organization could not be regarded as a joint stock association within the meaning of the Income Tax Law of October 3, 1913, the Court in its opinion, at page 234, speaking through Mr. Justice Holmes, says:

> "We perceive no ground for grouping the two—*beneficiaries** and trustees—together, in order to turn them into an association, . . ."

In *Hecht* v. *Malley*, 265 U. S. 144, in which certain "Massachusetts Trusts" were held to be associations within the meaning of the Revenue Act of 1918, the Court again refers to the certificate holders as "beneficiaries". On page 159 of its opinion, the Court says:

> "The *beneficiaries** had no control except in certain matters in which their consent was required."

Again, at pp. 160 and 161, the Court, commenting upon the opinion in *Crocker* v. *Malley*, supra, says:

> "And the language used *arguendo* in reaching this conclusion that the trustees could not be deemed an association unless all trustees with discretionary powers are such, and that there was no ground for grouping together the *beneficiaries** and trustees in order to turn them into an association—is to be read in the light of the trust agreement there involved, under which the trustees were, in substance, merely holding property for the collection of the income and its distribution among the *beneficiaries**, and were not engaged, either by themselves or in connection with the *beneficiaries**, in the carrying on of any business."

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*Italics ours.

These cases, it is submitted, show that wherever a trust exists, even though the interest of those who receive the income is usually acquired by purchase, the cestuis are commonly referred to as "beneficiaries". Simply because a widow is a "purchaser for value" of the income from a trust fund, does not, therefore, negative her status as a "beneficiary".

To further illustrate, suppose the beneficiary of a trust fund were to sell and transfer his right to receive the income therefrom to another, would not the purchaser thereby become the "beneficiary"? Certainly, the trustee, upon notice of the transfer, would be obliged to pay the income to the purchaser, but nevertheless it would seem that such payments could be deducted by the trustee from the gross income of the trust under Section 219 (b) (2). The mere fact, therefore, that the new beneficiary would be a "purchaser for value" would have no bearing upon the deductibility of the payments made to him by the fiduciary.

In aid of subdivisions (g) and (h) of Section 219 of the Revenue Act of 1924, Regulations 65, Article 347, prescribed and published by the Commissioner of Internal Revenue by virtue of the authority conferred upon him by that Act, define the meaning of the word "beneficiary" as follows:

> "The term 'beneficiary', as used in this Article, includes any person entitled to an interest in the income or the principal of a trust, but does not include one having a merely nominal interest in the income or principal."

This definition also appears in Regulations 69, Article 347, Revenue Act of 1926, and Regulations 74, Article 881, Revenue Act of 1928. Although the Commissioner has restricted the definition of the word "beneficiary",

as used in the particular Article of the Regulations in which it appears, nevertheless it is significant that it is given no such limited or restricted meaning as that which appears in the opinion of the Board of Tax Appeals.

In *United States* v. *Bolster*, 26 Fed. (2d) 760, one of the decisions upon which the Board of Tax Appeals bases its opinion that the widow in the case at Bar is a "purchaser for value", the Court recognises the fact that the widow is also a "beneficiary". The first words of the Court's opinion are, "Sarah A. Davenport, of Boston, was the *beneficiary* under the will of her husband . . ." and in conclusion the Court, at page 763, states:

> "While in the Warner case the Court had before it an annuity, the provision relating to the annuity was made expressly in lieu of statutory rights of the *beneficiary** in the estate; . . ."

Furthermore, the Supreme Judicial Court of Massachusetts, in *Gruver* v. *Wood*, 174 Mass. 540, has decided that a widow, who accepts a legacy under the will of her deceased husband in lieu of dower, is a "beneficiary" in the natural and ordinary sense which, as pointed out above, the Supreme Court of the United States has said is the sense to be given the language of all statutes. In that case, after bequeathing a specific legacy to his widow expressly in lieu of dower in accordance with an antenuptial agreement, the testator left the residue of his estate "to the several beneficiaries" under his will with certain named exceptions of which the widow was not one. The question was whether under these circumstances the widow was a "beneficiary" within the meaning of the residuary clause. The Court held that she was, and, in its opinion at page 541, says:

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*Italics ours.

"The only question is whether the widow is a 'beneficiary under this will' within the meaning of the residuary clause. We think she is. It is true the legacy to her in the second item is given apparently in pursuance of the ante-nuptial contract and in lieu of dower and of any other right she as widow might have in the personal estate of the testator, and that therefore in case of a deficiency of assets she would not be regarded as a 'mere' or 'pure beneficiary', but would be entitled to a preference. *Pollard* v. *Pollard*, 1 Allen, 490. *Towle* v. *Swasey*, 106 Mass. 100. Yet she receives something under the will, and in the natural and ordinary sense is a beneficiary, and we think the term was used by the testator in this sense."

It is both interesting and important to note that *Gruver* v. *Wood*, supra, was decided in Massachusetts in November, 1899, nearly 40 years after the decision by the same Court in the case of *Pollard* v. *Pollard*, 1 Allen 490, which it cites and which holds that a widow to whom a legacy is given in lieu of dower is a "purchaser for value". Furthermore, *Pollard* v. *Pollard* is relied upon and quoted from by the Circuit Court of Appeals in *United States* v. *Bolster*, supra, and that part of the opinion in the *Bolster* case which contains the quotation is set forth in the opinion of the Board of Tax Appeals in the case at Bar (R. 11, 12). Since the Board of Tax Appeals relies upon *United States* v. *Bolster*, supra, which was decided upon the authority of *Pollard* v. *Pollard*, supra, it would seem that, although the Board recognizes the authority of *Pollard* v. *Pollard*, it refuses to follow the decision of the same Court in *Gruver* v. *Wood*, supra. It is submitted, therefore, that the Board of Tax Appeals is in error and, as held in Massachusetts, a widow is a "beneficiary" even though she has paid for whatever beneficial interest

she is entitled to and is therefore also a "purchaser for value".

It being well established, therefore, that the language of a statute is to be given its plain, ordinary and natural meaning, it seems, both on principle and authority, that a widow, who has elected to receive for life the net income of a trust fund established in her favor by the will of her deceased husband, is a "beneficiary" even though, in accepting the provisions of said will, she waived her dower or statutory interest in his estate, and, hence, it is submitted that payments made to her by a trustee under such circumstances are payments to a "beneficiary" within the meaning of Section 219 (b) (2) of the Revenue Act of 1924. This position is further fortified by that rule of construction universally recognized which requires that, in case of doubt, the provisions of taxing statutes must be construed most strongly against the Government and resolved in favor of the taxpayer.

United States v. *Merriam*, 263 U. S. 179, 187;
Gould v. *Gould*, 245 U. S. 151, 153.

II. The object of Section 213 (b) (2) of the Revenue Act of 1924 is defeated by the construction placed upon Section 219 (b) (2) of that Act by the United States Board of Tax Appeals.

The Circuit Courts of Appeal in *Warner* v. *Walsh*, 15 Fed. (2d) 367, *United States* v. *Bolster*, 26 Fed. (2d) 760, and *Allen* v. *Brandeis*, 29 Fed. (2d) 363, cited above, have determined that the payments made to a widow in lieu of her right of dower, or her statutory share of the corpus of her deceased husband's estate, are not taxable income to such widow. These decisions rest upon the theory that, in receiving such payments, a widow in legal

effect is the purchaser of an annuity and, under Section 4 of the Revenue Act of 1916 and Section 213 (b) (2) of the Revenue Acts of 1918, 1921 and 1924, income of this kind is exempt from taxation until the widow has recovered the value of her interest in the decedent's estate which she has relinquished. These sections are substantially the same and provide:

> "The following income shall be exempt from the provisions of this title:
>
> . . . . the amount received by the insured, as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term or at the maturity of the term mentioned in the contract or upon the surrender of the contract; . . ." *Revenue Act of* 1916, *Section* 4.
>
> "That for the purposes of this title . . .
>
> (b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title:
>
> . . . . . .
>
> (2) The amount received by the insured as a return of premium or premiums paid by him under life insurance, endowment, or annuity contracts, either during the term, or at the maturity of the term mentioned in the contract, or upon surrender of the contract; . . ." *Revenue Acts of* 1918, 1921 *and* 1924, *Section* 213 (*b*) (2).

It being true, therefore, that a widow is not taxable on income received under these circumstances, it must be accepted that Congress did not intend the statute to apply to payments of this kind when received by the widow. Accordingly, if the fiduciary who makes these payments must pay a tax on the amount thereof, the widow's in-

come will be correspondingly reduced in amount, and the intention of Congress thereby thwarted. It is also true that in certain cases an additional hardship would be visited upon the widow. If, for example, the only income received by the widow was that distributed to her by the fiduciary in an amount insufficient to require the payment of a surtax thereon, but, on the other hand, the net income received by the fiduciary, when added to the taxable profit accruing to him from the sale of the trust securities, totaled an amount upon which a surtax must be paid by *him*, it is apparent that the income which would otherwise be payable to the widow must contribute to the extra burden of the surtax and consequently would be decreased by an amount even greater than if the tax were charged to and paid by the widow herself. Clearly, the trustee could not charge the tax against the principal of the trust for that would result in shifting the burden to the remaindermen, who have nothing to do with this controversy. The tax, if any is paid on this income by the trustee, must be charged against *income*. It is respectfully submitted that such a result would deprive the widow of the benefit of the decisions of the Circuit Courts of Appeal. The Board of Tax Appeals, in reply to this argument, says:

> "It is also argued that, if the respondent's position is sustained, the widow gets no real benefit from the decisions holding non-taxable the payments made in lieu of dower. It is not the purpose of courts to construe taxing laws so as to confer benefits other than those prescribed by the statutes. If it so happens that certain persons are benefited by one provision of the law, it does not follow that they must receive equal benefits under others. As pointed out above, the courts have not singled out widows and given them an exempt status, but have only in such cases as this, placed them

in the same class as other purchasers of annuities." (R. 16)

It is not being sought in this case to persuade the Court "to construe taxing laws so as to confer benefits other than those prescribed by the statute". The respondents, however, are seeking to enjoy the benefit of the taxing laws when such benefits are expressly prescribed by them. The Circuit Courts of Appeal, above referred to, have treated widows in circumstances like those present in the case at Bar, like purchasers of annuities and, as such, under the provisions of the Revenue Acts of 1916, 1918, 1921 and 1924 above cited, are exempt from taxation. It should be remembered that the Circuit Courts of Appeal, in the Warner, Bolster and Brandeis cases, were not confronted with the question now being considered, and, for the purpose of those decisions, it was sufficient to arrive at the conclusion that the widow was in legal effect the purchaser of an annuity. If, however, the facts of the case now before the Court are examined, it will be seen that, under the provisions of the testator's will, his widow is entitled to receive the entire net income from the rest and residue of his property for the term of her natural life. This situation, it is submitted, is not parallel to that of the ordinary annuity contract, in accordance with the terms of which, the annuitant is entitled to receive a stated annual amount which may be paid from any source chosen by the obligor and not the entire income from a specific and particular fund, as in the case at Bar. In the first case, that of the ordinary annuity contract, all income received by the obligor is taxable because it is in no way related to the payments which are made to the annuitant, the obligor being free to use such income as he sees fit, his sole obligation being to pay a stated amount of money annually to the annuitant.

In the case at Bar, however, the trustees are not at liberty to use the income from the trust fund as they see fit, because the terms of the testator's will confer the beneficial ownership of such funds upon his widow and it is the obligation of the trustees to turn over to the widow all income received from the investment of the fund. Under these circumstances, it is submitted that the income in the case at Bar should not be taxed to the trustees because in reality it belongs to the widow who is exempt from taxation.

On the other hand, if the widow in the case at Bar is, as the Board of Tax Appeals states, to be placed in the same class as other purchasers of annuities, it is respectfully submitted that she should be treated the same as other purchasers of annuities, who, if their contract calls for the receipt of a definite amount of money per annum, are entitled to enjoy the benefit of their contracts without the payment of any tax. To hold in the case at Bar that the widow is in legal effect the purchaser of an annuity but that her income from the trust fund is subject to the payment of a tax, whereas the payments received by other annuitants are not taxable, is both inconsistent and unfair. Although the Board of Tax Appeals in its opinion (R. 16) states that the case of *Lederer* v. *Stockton*, 260 U. S. 3, has no application in the case at Bar for the reason that the taxing statute does not purport to put widows in an exempt class and because there is no provision for them which could be construed as evidencing in their behalf any "beneficent purpose of Congress", it is submitted that that case has a strong bearing upon the construction which should be given the Revenue Act in question. Section 213 (b) (2) does, it is contended, place widows in an exempt class in so far as they are receiving income from a trust fund in lieu of their dower or statutory interest in an estate, at least until they have

received the value of the interest they have surrendered, and, accordingly, that Section does evidence a "beneficent purpose of Congress" which would be defeated by the construction placed upon the Revenue Act by the Board of Tax Appeals.

It should also be remembered that the fiduciary in the case at Bar is a mere conduit through which the widow receives her payments. Congress, it seems, must have had this fact in mind when it established Section 219 (b) (2) and (3) of the Revenue Act of 1924, allowing a deduction to be made by the fiduciary for the amount of income currently distributed to the beneficiaries. In fact, the Board of Tax Appeals has recognized this fact in *Jacob Brown, Trustee, et al.* v. *Commissioner of Internal Revenue*, 9 B. T. A. 521. In that case the entire income from property held in trust under a will was distributed by the trustee in 1920 to the beneficiaries of the trust pursuant to the direction of the testator; and it was held that the trustee was not liable to income tax in respect of the income distributed, but that the beneficiaries who received such income were liable to income tax on the amounts received by them. In its opinion, at page 525, the Board says:

> "The trustee was merely the conduit through which they received their income. The conduit should not be charged with income tax in respect of the income paid over to beneficiaries during the taxable year."

No other case has been heard of in which the Government has contended that, because the income could not be taxed to the beneficiary, it is taxable to the trustee. This contention is made only in the case of widows to whom the courts have shown a praiseworthy leniency because the income received by them was in reality in substitution for their legal rights in the estate. If they are exempt under

these decisions, it is their deserved good fortune, but this constitutes no reason for shifting the tax to the trustee, and thus taxing them indirectly and destroying the exemption. There is no principle of the income tax law, or any other law, which requires that all income, if not taxed at one place, must be taxed at another.

CONCLUSION.

For the reasons above set forth, namely, that the Revenue Act of 1924 expressly entitles the respondents in the case at Bar to the deduction they are seeking and is opposed to the imposition of a tax upon them because it would frustrate the purpose of the statute, the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

BURTON E. EAMES,
R. GAYNOR WELLINGS,
Amici Curiae.

TYLER, EAMES, WRIGHT & REYNOLDS,
of Counsel.

October, 1933.

SUPREME COURT OF THE UNITED STATES.

Nos. 75, 76, 77 and 78.—October Term, 1933.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 75 *vs.* Julia Butterworth, et al., Trustees under the Will of William B. Butterworth, Deceased.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 76 *vs.* Fidelity-Philadelphia Trust Company, Trustee under the Will of William L. DuBois, Deceased.	
Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 77 *vs.* Frank Pardee, et al., Trustees under the Will of Calvin Pardee.	
Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 78 *vs.* Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 11, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

These causes demand construction and application of the provisions of Sec. 219, Rev. Act of 1924, c. 234, 43 Stat. 253, 275 (U. S. C., Title 26, Sec. 960) (copied in the margin*) which lay

*Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

Sec. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including— . . .

(2) Income which is to be distributed currently by the fiduciary to the

a tax upon "the income of estates or of any kind of property held in trust," and direct that (b) (2) "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, . . . but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. . . ." Also, the identical provisions of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32, 33; and the substantially similar ones of the Revenue Act of 1928, c. 852, 45 Stat. 791, 838, Sections 161 and 162.

In each cause the Commissioner of Internal Revenue assessed the portion of the income from the trust created by the husband's will which had been paid to the widow. The trustees claimed credit therefor. The Board of Tax Appeals approved the assessments. The Circuit Courts of Appeals held otherwise.

Causes Nos. 75, 76 and 78 involve the same point of law. The undisputed facts are similar and it will suffice to state those of No. 75. The record in No. 77 presents another question and the facts there will be set out.

No. 75

William B. Butterworth, resident of Pennsylvania, died October 5, 1921. After certain bequests, his will gave the residue of the estate to respondents as trustees, with directions to pay the

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beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct; . . .

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that— . . .

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year.

net income to the widow. She accepted under the will and surrendered the rights granted her by the State laws. During 1924 and 1925 the trustees paid her the income from the trust. The aggregate of these and antecedent payments was less than the estimated value of her statutory rights in the estate. In order to ascertain the taxable income of the trust, the respondents claimed the right to deduct from the gross amount payments made to the widow. The Commissioner denied this and the Board of Tax Appeals approved his action. The court below reversed the judgment.

Prior to *Warner* v. *Walsh*, 15 F. (2d) 367, *United States* v. *Bolster*, 26 F. (2d) 760, and *Allen* v. *Brandeis*, 29 F. (2d) 363, the Commissioner ruled that distributions from the income of a trust estate to the widow who elected to take under her husband's will in lieu of her statutory interest were taxable to her. These cases held that by relinquishment of her rights, she came to occupy the position of the purchaser of an annuity. They decided that payments to her were not subject to taxation until her total receipts from the trust estate amounted to the value of what she relinquished—her alleged capital. Thereafter, in similar cases, the Commissioner refused to give credit to the trustee for such payments and thus the present causes arose.

We cannot accept the reasoning advanced to support the three cases just cited. The evident general purpose of the statute was to tax in some way the whole income of all trust estates. If nothing was payable to beneficiaries, the income without deduction was assessable to the fiduciary. But he was entitled to credit for any sum paid to a beneficiary within the intendment of that word, and this amount then became taxable to the beneficiary. Certainly, Congress did not intend any income from a trust should escape taxation unless definitely exempted.

Is a widow who accepts the provisions of her husband's will and receives part or all of the income from an established trust in lieu of her statutory rights a beneficiary within the ambit of the statute? We think she is. It is unnecessary to discuss her rights or position under other circumstances. We are dealing with a tax statute and seeking to determine the will of Congress.

When she makes her election the widow decides to accept the benefits of the will with the accompanying rights and liabilities. In no proper sense does she purchase an annuity. For reasons satis-

factory to herself, she expresses a desire to occupy the position of a beneficiary and we think she should be so treated.

The trustees in Nos. 75, 76 and 78 were entitled to the credits claimed and the judgments of the courts below therein must be affirmed.

No. 77

Calvin Pardee, a resident of Pennsylvania, died March 18, 1923. His will provided—"I also give unto my said wife an annuity of Fifty thousand Dollars ($50,000.), to be computed from the date of my decease and to be paid in advance in quarterly payments." The total amount paid by the trustees to the widow under the will during the tax years 1924 and 1925 and prior thereto did not aggregate the value of the interest to which she would have been entitled had she declined to take under the will. When computing the taxable income of the estate the trustees deducted the amounts paid to the widow, claiming credit therefor under Sec. 219. The Commissioner's refusal to allow this was sustained by the Board of Tax Appeals. The court below ruled otherwise.

The annuity provided by the will for Mrs. Pardee was payable at all events. It did not depend upon income from the trust estate. She elected to accept this in lieu of her statutory rights. She chose to assume the position of an ordinary legatee. Section 213 (b) (3), Revenue Act of 1924, c. 234, 43 Stat. 253, 267, 268, exempts bequests from the income tax there laid. Payments to Mrs. Pardee by the fiduciary were not necessarily made from income. The charge was upon the estate as a whole; her claim was payable without regard to income received by the fiduciary. Payments to her were not distribution of income; but in discharge of a gift or legacy. The principle applied in *Burnet* v. *Whitehouse*, 283 U. S. 148 is applicable.

The Commissioner rightly refused to allow the credits claimed by the trustee and the judgment of the court below must be reversed.

SUPREME COURT OF THE UNITED STATES.

No. 77.—October Term, 1933.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Frank Pardee, Ario Pardee, and Girard Trust Company, Trustees under the will of Calvin Pardee.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 11, 1933.]

The Chief Justice, dissenting.

I agree with the opinion of the Court in Nos. 75, 76 and 78. I am unable to agree with the opinion in No. 77. In that case, the testator created a trust for the benefit of his wife, children, and grandchildren. The income of the trust, by its express terms, was to be paid to his wife to the extent of $50,000 a year. While the payment of this annual amount was also charged on the principal of the estate, resort could not be had to the principal if the income of the trust was sufficient. *Johnston's Estate,* 264 Pa. 71, 76. The widow was in every sense of the word a beneficiary of the trust, and the amounts paid to her out of the income of the trust were paid to her as a beneficiary. These amounts were thus deductible by the trustees, under the express provision of Section 219 (b) (2) of the Revenue Act of 1924, from the gross income of the trust. As to this, I think it makes no difference whether or not the widow was taxable on the amount of the income she received. The decision of the Circuit Court of Appeals should be affirmed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 76

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE UNDER THE WILL OF WILLIAM L. DuBOIS, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 48492

FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE UNDER THE WILL OF William L. Dubois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For taxpayer—John B. Peery, C.P.A., Robert T. McCracken, Esq.; for Comm'r: M. M. Mahaney, Esq.

Docket entries

Apr. 26, 1930. Petition received and filed. Taxpayer notified. (Fee paid.)
Apr. 28, 1930. Copy of petition served on General Counsel.
May [illegible], 1930. Answer filed by General Counsel.
May 28, 1930. Copy of answer served on taxpayer. General Calendar.
Jan. 23, 1932. Motion to consolidate with dockets 43883 and 51669, filed by taxpayer. January 25, 1932, granted.
Jan. 23, 1932. Notice of appearance of John B. Peery as counsel, filed.
Jan. 28, 1932. Hearing had before Mr. Trammell, div. 2 on merits. Stipulation of facts filed. Briefs due in 60 days.
2 Feb. 3, 1932. Transcript of hearing January 28, 1932, filed.
Mar. 25, 1932. Brief filed by taxpayer.
May 25, 1932. Brief filed by General Counsel.
Apr. 30, 1932. Findings of fact and opinion rendered, Mr. Trammell, div. 2. Judgment will be entered under rule 50.
May 26, 1932. Notice of settlement filed by General Counsel.
June 3, 1932. Decision entered, Mr. Trammell, div. 2.
June 13, 1932. Supersedeas bond for $3,526.82 approved and ordered filed.
June 13, 1932. Petition for review by U.S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer. Proof of service thereon.
June 13, 1932. Præcipe filed by taxpayer. Proof of service thereon.

Before United States Board of Tax Appeals

Docket No. 51069

FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE UNDER THE WILL OF William L. DuBois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For taxpayer—John B. Peery, C.P.A., Robert T. McCracken, Esq.; for Comm'r: M. M. Mahaney, Esq.

Docket entries

Dec. 30, 1930. Petition received and filed. Taxpayer notified. (Fee paid.)
Dec. 30, 1930. Copy of petition served on General Counsel.
Feb. 12, 1931. Answer filed by General Counsel.
Feb. 18, 1931. Copy served. General Calendar.
Jan. 23, 1932. Motion to consolidate with dockets 43883 and 48492, filed by taxpayer. January 25, 1932, granted.
Jan. 28, 1932. Hearing had before C. M. Trammell, div. 2 on merits. Submitted. Stipulation of facts filed. Briefs due in 60 days.
Feb. 3, 1932. Transcript of hearing of Jan. 28, 1932, filed.
Mar. 25, 1932. Brief filed by General Counsel.
4 Mar. 25, 1932. Brief filed by taxpayer.
Apr. 30, 1932. Findings of fact and opinion rendered, Mr. Trammell, div. 2. Judgment will be entered for the respondent.
May 4, 1932. Decision entered, C. M. Trammell, div. 2.
June 13, 1932. Supersedeas bond for $3,526,82 approved and ordered filed.
June 13, 1932. Petition for review by U.S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer. Proof of service thereon.
June 13, 1932. Præcipe filed by taxpayer. Proof of service thereon.

5 Before United States Board of Tax Appeals

Docket No. 48492

[Title omitted.]

Petition

Filed April 26, 1930

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Reve-

nue in his notice of deficiency (IT:AR:B-7-JWJ-60D) dated February 28, 1930, and as a basis of this proceeding alleges as follows:

First. The petitioner is a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, and as such is trustee under the will of William L. DuBois, deceased, with principal office at 135 South Broad Street, Philadelphia, Pennsylvania.

Second. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on February 28, 1930.

6 Third. The tax in controversy is income tax for the calendar year 1926 in the amount of $905.76, all of which is denied.

Fourth: The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In holding that the distributions of the income received and distributed by the petitioner, during the taxable year 1926, to the widow of William L. DuBois, deceased, under the will of said deceased person, constitute capital expenditures, and that said distributions constitute taxable income to the trustee.

(b) In computing a normal tax upon the sum of $3,746.42 representing dividends on stocks of domestic corporations.

(c) In assessing a tax on one third of the income payable to organized charitable institutions.

Fifth. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) William L. DuBois died on October 26, 1918, leaving an estate valued at approximately six hundred and seventy-nine thousand dollars ($679,000), the income from which estate was, by the terms of the decedent's will, distributable to his widow, Mrs. Mary C. DuBois, for life, after the payment of an annuity of $4,000.

(b) During the year 1926 the petitioner, as trustee under the will of William L. DuBois, deceased, distributed the income received from the estate of said deceased person to Mrs. Mary C. DuBois and so reported this fact to the Commissioner of Internal Revenue.

7 (c) Section 219 (a) 2, Revenue Act of 1926.

Regulations 69, article 342, promulgated by the Commissioner of Internal Revenue under Revenue Act of 1926.

(d) That the Revenue Act of 1926 provides that dividends of stocks of domestic corporations are not subject to normal tax.

(e) The will of William L. DuBois provides that after the death of his widow, Mrs. Mary C. DuBois, one third of the income from his residuary estate was to be paid to his granddaughter, Mary C. DuBois, for life and upon her death, one third of the principal is to pass to her issue, and in default of issue, to the following charitable institutions:

The contributors to the Pennsylvania Hospital, 55 percent of one third of the residuary estate;

The Presbyterian Orphanage of the State of Pennsylvania, 15 percent of one third of the residuary estate;

The Presbyterian Hospital in Philadelphia, 15 percent of one third of the residuary estate;

The Board of Foreign Missions of the Presbyterian Church in the United States, 15 percent of one third of the residuary estate.

(f) That the testator's granddaughter, Mary C. BuBois, predeceased her grandmother, Mary C. BuBois, leaving no issue, so that one third of this estate passes absolutely to charity on the death of the life tenant and is exempt from income tax.

Wherefore the petitioner prays that this Board may hear and determine its appeal and that relief may be granted from the
8 deficiency asserted by the Commissioner of Internal Revenue.

FIDELITY-PHILADELPHIA TRUST COMPANY,
Trustee, Under the Will of William L. DuBois, Deceased,
By N. C. DENNEY, *Vice President.*

[*Duly sworn to by N. C. Denney; jurat omitted in printing.*]

9 *Exhibit A to petition*

N-p 2.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, February 28, 1930.

Trust u/w WILLIAM L. DUBOIS,
Fidelity-Philadelphia Trust Company,
415 Chestnut Street, Philadelphia, Pennsylvania.

SIRS: In accordance with section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1926 discloses a deficiency of $905.76 as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days

after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

ROBT. H. LUCAS,
Commissioner,
By (signed) DAVID BURNET,
Deputy Commissioner.

Inclosures:
Statement.
Form 866.
Form 882.

IT:AR:B-7
JWJ-60D

FEBRUARY 28, 1930.

STATEMENT

In re: Trust u/w WILLIAM L. DUBOIS,
Fidelity-Philadelphia Trust Company,
415 Chestnut Street, Philadelphia, Pennsylvania.

Year	Corrected tax liability	Tax previously assessed	Deficiency
1926	$905.76	None	$905.76

The audit of the income tax liability of the trust discloses the following adjustments:

	1926
Net income shown by return	None
Add:	
1. Income from tax-free covenant bonds	$16,503.76
2. Other income	2,757.38
3. Dividends	3,746.42
Total net income subject to surtax	$23.007.56
Less: Exemption	1,500.00
Balance subject to normal tax	$21,507.56
Normal tax at 1½% on $4,000.00	$60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $13,507.56	675.38
Surtax on $23,077.56	380.45
Total tax	$1,235.83
Less: Tax paid at source	330.07
Tax deficiency	$905.76

Explanation of changes

1, 2, and 3. The income distributed to Mrs. Mary C. DuBois in lieu of dower right is taxable to the estate. (See I.T. 2480, Bulletin 29, volume 8, page 4.)

Payment should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1926, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3867 to discuss your case before mailing formal notice of its determination as provided by section 274 (a) of the Revenue Act of 1926. It is, therefore, necessary at this time, in order to protect the interest of the Government, to issue this formal notice o fdeficiency.

12 Before U.S. Board of Tax Appeals

Docket No. 48492

Answer

Filed May 26, 1930

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition herein, admits and denies as follows:

First. Admits the allegations of the first paragraph of the petition.

Second. Admits the allegations of the second paragraph of the petition.

Third. Admits the tax in controversy is income tax for the calendar year 1926, and denies that the amount in controversy is $905.76.

Fourth. Denies that the Commissioner erred as alleged in the fourth paragraph of the petition.

Fifth. For lack of knowledge denies the allegations contained in the fifth paragraph of the petition.

Denies each and every allegation of fact contained in said petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the Commissioner be affirmed.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
BROOKS FULLERTON,
Special Attorney, Bureau of Internal Revenue.

13 Before United States Board of Tax Appeals

Docket No. 51,669

[Title omitted.]

Petition

Filed December 30, 1930

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his deficiency letter (IT:AR:B-1-AMK-60D) bearing date of December 11, 1930, a copy of which letter is attached hereto and made a part hereof, and as a basis for this proceeding alleges as follows:

First. The petitioner is a body corporate organized under the laws of the State of Pennsylvania and as such is the duly appointed and qualified trustee under the will of William L. DuBois, deceased.

Second. The deficiency letter of the Commissioner of Internal Revenue bears date of December 11, 1930, though the actual date of mailing same is unknown to the petitioner.

14 Third. The tax in controversy is income tax in the sum of $1,044.97 for the taxable year 1927.

Fourth. The determination of the deficiency set forth in the Commissioner's deficiency letter above referred to is based upon the following errors:

(a) In holding that income received during the taxable year 1927 and distributed to the widow of William L. DuBois, deceased, under the terms of the will of said deceased person, constitute capital expenditures, and that said distributed income is taxable to the trustee for income tax purposes.

(b) Should the Board hold that the income of the trust established by the will of William L. DuBois, deceased, is properly taxable to the trustee, then the Commissioner of Internal Revenue has erred in that no allowance as a deduction from gross income has been made for income accumulated for the benefit of certain charitable institutions named in the will of William L. DuBois, deceased.

Fifth. In support of its petition the petitioner relies upon the following facts:

(a) William L. DuBois died on October 26, 1918, leaving an estate valued for purposes of Federal estate tax at approximately six hundred and seventy-nine thousand dollars ($679,000) the income from which estate was, by the terms of the decedent's will, distributable to his widow, Mrs. Mary C. DuBois, for life, after the payment of an annuity of four thousand dollars ($4,000) per annum.

(b) During the year 1927 the petitioner, as trustee under
15 the will of William L. DuBois, deceased, distributed to Mrs. Mary C. DuBois $24,731.88 prior to her death on November 22, 1927, and distributed to the executor of Mary C. DuBois, de-

ceased, the balance of the income accrued and unpaid at the date of her death.

(c) The distributions made to Mrs. Mary C. DuBois during the year 1927 added to distributions made to her in prior years did not total an amount equal to the value of her statutory rights in the estate of William L. DuBois, deceased.

(d) The will of William L. DuBois, deceased, contained a provision for the payment to his granddaughter, Mary C. DuBois, the income from one third of the residue of his estate, after she attained her majority and after the death of his wife, Mrs. Mary C. DuBois. The will of William L. DuBois, deceased, provided further that should his granddaughter, Mary C. DuBois, die without issue this one third of his residuary estate went to certain charitable institutions named in the will.

(d) Mary C. DuBois, granddaughter of William L. DuBois, deceased, died on August 26, 1924, which date is prior to the date of the death of Mrs. Mary C. DuBois, widow of William L. DuBois, deceased, and at the time of her death was without issue.

Wherefore the petitioner prays that this Board may hear and determine its appeal and that relief may be granted from the deficiency asserted by the Commissioner of Internal Revenue.

JOHN B. PEERY.
JOHN B. PEERY, C.P.A.,
510 First Natl. Bank Bldg., Baltimore, Maryland,
Counsel for the Petitioner.

[*Duly sworn to by N. C. Denney; jurat omitted in printing.*]

17 *EXHIBIT TO PETITION*

(Copy)

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Dec. 11, 1930.

FIDELITY-PHILADELPHIA TRUST COMPANY, *Trustee,*
u/w William L. DuBois, Philadelphia, Pennsylvania.

SIRS: You are advised that the determination of your tax liability for the year (s) 1927 discloses a deficiency of $1,044.97, as shown in the statement attached.

In accordance with section 274 of the Revenue Act of 1926, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing

of your return(s) by permitting an earlier assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is
18 earlier; Whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.

By (signed) W. T. SHERWOOD,
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

IT:AR:B-1
AMK-60D

STATEMENT

In re: FIDELITY-PHILADELPHIA TRUST COMPANY, *Trustee,*
u/w William L. DuBois, Philadelphia, Pennsylvania.

Year	Corrected tax liability	Tax previously assessed	Deficiency
1927	$1,049.95	$4.98	$1,044.97

Reference is made to your letter dated December 3, 1930, in reply to office letter of November 29, 1930, relative to the tax liability of the trust u/w of William L. DuBois for the year 1927.

Careful consideration has been accorded the information furnished in your letter relative to income distributed to Mary C. DuBois, deceased, after her death, but accrued prior thereto.

It is held, however, that the income in question, consisting of $380.57 dividends and $1,859.68 as other income, is taxable to this trust inasmuch as the income had accrued prior to the death
19 of Mary C. DuBois and since up to that time the decedent had not received from the estate of William L. DuBois her statutory interest therein. See income tax ruling 2480, Cumulative Bulletin VIII-2, page 141.

Net income reported on return		$1,832.31
Add:		
1. Dividends		4,394.97
2. Other income		19,373.10
Net income adjusted		$26,200.38
Less:		
Dividends	$4,394.97	
Personal exemption	1,500.00	
		5,894.97
Income subject to normal tax		$20,305.41

Normal tax at 1½% on $4,000.00	$60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $12,305.41	615.27
Surtax on $26,200.38	594.08
Total tax	$1,389.30
Less: Tax paid at source	339.35
Net tax liability	$1,049.95
Tax previously assessed	4.98
Deficiency in tax	$1,044.97

Payment should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

20 Before U.S. Board of Tax Appeals

Docket No. 51669

Answer

Filed February 12, 1931

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

First. Admits the allegations contained in paragraph first of the petition.

Second. Admits the allegations contained in paragraph second of the petition.

Third. Admits the allegations contained in paragraph third of the petition.

Fifth. For lack of sufficient information upon which to form a belief, denies the allegations contained in paragraph fifth (a), (b), (d), and (e); admits the allegations contained in paragraph fifth (c) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:

MAXWELL M. MAHANY,
Special Attorney, Bureau of Internal Revenue.

21 Before United States Board of Tax Appeals

Docket Nos. 43883, 48492, 51669

[Title omitted.]

Motion to consolidate cases

Filed January 23, 1932

Comes now the petitioner by its representative, John B. Peery, C.P.A., and moves that the three above-pending appeals be consolidated for hearing on January 28, 1932, for the following reasons:

First. The case of docket no. 43883 is now set for a hearing before the Board on January 28, 1932, and the petitioner expects to produce testimony before the Board as to the running of the statute of limitations, as alleged in its "motion to amend petition" previously filed with the Board.

Second. As to all other allegations of error in the three cases it is expected that an "agreed statement of facts" will be submitted to the Board by the respondent and the petitioner, as a basis
22 for the Board's decision, the errors alleged by the petitioner as to the major issues in all of these cases being identical.

(Sgd.) JOHN B. PEERY, C.P.A.,
510 First National Bank Building, Baltimore, Maryland,
For the Petitioner.

Granted January 25, 1932.

(Sgd.) LOGAN MORRIS,
Member, United States Board of Tax Appeals.

Before United States Board of Tax Appeals

Agreed statement of facts

Filed January 28, 1932

The petitioner, Fidelity-Philadelphia Trust Company, a body corporate under the laws of the State of Pennsylvania and successor to the Philadelphia Trust Company, is the duly qualified and acting trustee under the will of William L. DuBois, deceased, who died October 26, 1918, while a resident of Pennsylvania. The will, dated December 14, 1915, with codicils dated February 23, 1916, June 26, 1917, September 20, 1917, and December 7, 1917, and duly admitted to probate in Philadelphia County, Pennsylvania, provided, so far as is pertinent to the issues herein involved, as follows:

"VI. All the rest, residue, and remainder of my estate, real, personal, and mixed, . . . I give, devise, and bequeath to my son,

Henry C. DuBois, and the Philadelphia Trust Company, in trust for the following uses, intents, and purposes, that is to say, to
23 hold and invest the said trust estate either in the securities and other assets that I may leave or in such others as my trustees in their discretion may acquire, with the power to acquire real estate, and to alter, sell, change, and shift the investments, . . . releasing them from all liability to loss by reason of the exercise of this discretion; to collect the income and to pay first the sum of four thousand (4,000) dollars per annum to my son Henry C. DuBois, . . . until the death of his mother, and the balance to my wife, Mary C. DuBois, for and during all the term of her natural life, and upon her decease, . . . to continue the said trust estate for the following purposes, viz: . . . to pay two thirds of the income to my son Henry C. DuBois . . . for and during all the term of his natural life, and upon his decease to transfer, convey, and assign the portion of the trust estate thus directed to be held for him to such person or persons . . . or charities, and for such estate or estates as he, . . . shall by his last will and testament direct, limit, and appoint, . . . and in default of his exercise of his power of appointment, to transfer, convey, and asign the said portion to the children and issue of deceased children of my son Henry by representation . . . and in default of appointment and issue, then to the following charities in the proportions herein named: . . .

Pennsylvania Hospital	55%
The Presbyterian Orphanage	15%
The Presbyterian Hospital	15%
The Board of Foreign Missions of the Presbyterian Church	15%

"As to the remaining one third of the income, I direct that it be accumulated during the minority of my granddaughter, Mary C. DuBois, the said accumulations not to be for her benefit except as to the allowance hereinafter provided, but to be paid from the time of my decease up to the time of her majority, or death if it occur earlier, with all accretions and increase, to the Pennsylvania
24 Hospital as a gift to it; and from and after her majority, the said income shall be paid to her for and during the term of her natural life . . . and from and immediately after her decease then to transfer the principal upon which she had thus been appointed to receive the income, and which was held for her benefit, being the one-third part remaining of my residuary estate, to the children and remoter issue of my said granddaughter by representation, and in default of issues, then to the same charities and in the same proportions as already named in connection with my said son Henry's share; provided that a sum not exceeding three thousand (3,000) dollars per annum out of the income may be expended or accumulated for her benefit during her minority, should that amount be required for the purpose, and I appoint Henry C. DuBois and the Philadelphia Trust Company to be her guardians to arrange

RESPONDENT'S EXHIBIT "A."

ACCEPTED — FOURTH QUARTER

Form 1041
U. S. Treasury Department

FIDUCIARY RETURN OF INCOME
For Calendar Year 1926

No. 109

No. 951938

RECEIVED
MAR 11 1927

11-15-27
Exmp
Ltr A.R.-18

For fiscal year beginning ____, 1926, and ended ____, 1927

File this form for each year on the 15th day of the third month following the close of the taxable year (Sec. 3 Fiduciary Act, approved February 24, 1919).

Name of estate or trust: [illegible] WILLIAM L. [illegible], DECEASED

Name and address of fiduciary: GIRARD TRUST COMPANY, PHILADELPHIA, PENN'A, Trustee

416 CHESTNUT STREET, PHILADELPHIA, PA.

1. Was a return of income for 1926 filed on behalf of the estate or trust named above? Yes
If so, to what collector's office was it sent (give district or city and State)? Philadelphia, Penna.
Give date of creation of trust or decedent's death: January 20, 1919

INCOME

2. Net profit from Trade or Business (Form 1040-C)	575 46	
3. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds	10,719 85	
4. Income from Partnerships, Fiduciaries, etc.		
		10,719 85
5. Rents and Royalties		
6. Profit from Sale of Real Estate, Stocks, Bonds, etc.		
7. Dividends on Stock of Domestic Corporations	43 46	
8. Other Income (including dividends received on stock of foreign corporations)		
(a)		
(b)		
(c)		29,367 69
Total Income as shown in lines 1 to 8		
9. Interest Paid	1,125 44	
10. Taxes Paid		
11. Losses by Fire, Storm, etc.		
12. Bad Debts		
13. Contributions		
14. Other Deductions Authorized by Law (Explain in detail) SHARES FOR EXPENSES OF TRUSTEE	1,552 53	
15. Total Deductions as shown in lines 9 to 14		2,677 97
16. Net Income (line 8 minus line 15)		26,689 72

17. BENEFICIARIES' SHARES OF INCOME AND CREDITS

Name and address of each beneficiary	Class of beneficiary	Proportion of net income	Amount of net income	Amount of tax	Amount of credit for tax paid at source	Amount of tax to be paid by beneficiary
(a) Harry C. Dalton, c/o E. J. Lonsdale, Bullitt Bldg., Phila.	Annuity	2.00%	533 57	13 05	5 13	7 92
(b) Harry C. Dalton, 1700 Pine Street	Balance	14.26%	3,746 47	192 61	38 07	154 54
(c)						
(d)						
(e)						
(f)						
(g)						
(h)						
(i)						
(j) Totals		16.26%	4,280 04	205 66	43 20	162 46

18. NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.

(a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia		
(b) Securities issued under the provisions of the Federal Farm Loan Act, or under such Act as amended		
(c) Liberty 3½% Bonds and other obligations of United States issued before Sept. 1, 1917, and obligations of United States possessions	5 000	175
(d) Liberty 4% and 4½% Bonds and other obligations of the United States issued after September 1, 1917	47 000	2129 25

A-1

SCHEDULE A—INCOME FROM TRADE OR BUSINESS (See Instruction 1)

3. Total receipts from trade or business (State kind of business)

Cost or Gross Sales		Gross Income Deductions	
1. Labor		10. Salaries, exclusive of "Labor," reported on Line 9	
2. Material and supplies		11. Interest on business indebtedness to others	
4. Merchandise bought for sale		12. Taxes on business and business property	
5. Other costs (Describe below or on separate sheet)		13. Losses by fire, storm, etc. (explain in terms provided thereafter at foot of page)	
6. Plus inventory at beginning of year		14. Bad debts arising from sales	
7. Totals (Lines 2 to 6, inclusive)		15. Depreciation, obsolescence, and depletion (explain in terms provided thereafter at foot of page)	
8. Less inventory at end of year		16. Rent, repairs, and other expenses (Describe below or on separate sheet)	
9. Net Cost or Gross Sales (Line 7 minus Line 8)		17. Totals (Lines 10 to 16, inclusive)	
		18. Total Deductions (Line 9 plus Line 17)	
		19. Net Profit (Line 3 minus Line 18) (Show as Item 7)	

Description of deductions claimed on Lines 5 and 16:

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 2)

1. Kind or Property	2. Amount Received	3. Cost	4. Value as of March 1, 1913	5. Depreciation (Other than Amount Claimed in Item 7)	6. Expenses	7. Gross Income (Column Deducted)	8. Net Profit (Enter on Item 8)

Explanation of deductions claimed in Column 7

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 3)

1. Kind or Property	2. Date Acquired	3. Amount Received	4. Deductions Allowable (Same Amount Claimed)	5. Cost	6. Value as of March 1, 1913	7. Depreciation (Since Acquired)	8. Net Profit (Enter on Item 9)

Sale of property owned

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 4a)

1. Kind of Property	2. Date Acquired (Mo. Day Year)	3. Date Sold (Mo. Day Year)	4. Amount Received	5. Deductions Allowable (Same Amount Claimed)	6. Cost	7. Value as of March 1, 1913	8. Depreciation (Since Acquired)	9. Net Gain or Loss (Enter on Line 10)

Sale of property owned

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 10, 15, AND 16

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If claimed under Schedule A)	2. Date Acquired	3. Cost or Other Basis	4. Depreciation Allowed (Since Acquired)	5. Cost	6. Value as of March 1, 1913	Amount of Depreciation Claimed This Year: 7. Previous years	8. This year

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 13

1. Kind of Property	2. Date Acquired	3. Cost	4. Value as of March 1, 1913	5. Depreciation (Since Acquired)	6. Insurance and Amount Received	7. Net Loss Sustained	8. Deductible Loss

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith for the corresponding period in stated, pursuant to the Revenue Act of 1916 and the Regulations issued under authority thereof.

Sworn to and subscribed before me this ____ day of _____, 1917.

FIDELITY-PHILADELPHIA TRUST CO. Executor under Will of William J. Dobbin, Deceased

(Official character)

(This signature cannot be officially attested "Attorney" cannot sign)

A-2

Form 1041
U. S. Treasury Department
Internal Revenue Service

FIELD AUDIT
FIDUCIARY RETURN OF INCOME
For Calendar Year 1927

For Fiscal Year beginning _____, 1927, and ended _____, 1927

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year

B 109
51519

Name of Estate or Trust: THIRD SECOND 7/11 OF 7/11/27 I. DUBOIS, DECEASED

Name and Address of Fiduciary: FIDELITY-PHILADELPHIA TRUST COMPANY
618 SECOND STREET,
PHILADELPHIA, PA.

11-15-27 Mem B 25 A-R-B

1. Was a return of income for 1927 filed on behalf of the estate or trust named above? Yes
2. If so, to what collector's office was it sent (give district or city and State)? 1st Penna. Dist Phila
3. Give date of creation of trust or decedent's death 1/11/27

CARDED 11-20-28

INCOME

1. Net profit from Trade or Business (Form 1040, Sch. A)		
2. Interest on Bank Deposits, Notes, and Corporation Bonds, etc. (except interest upon which a tax was paid at source)	5526	46
(a) Interest on Thirty Covenant Bonds upon which a tax was paid at source	19355	
3. Income from Partnerships, Fiduciaries, etc. (Give name and address)		
4. Rents and Royalties (Form 1040, Sch. B)		
5. Profit from Sale of Real Estate, Stocks, Bonds, etc. (Form 1040, Sch. D)		
6. Dividends on Stock of Domestic Corporations	5014	
7. Other Income (including dividends received on stock of foreign corporations) (Form 1040, Sch. C)		
(a)		
(b)		
(c)		
8. Total Receipts on Items 1 to 7	29965	46

DEDUCTIONS

9. Interest Paid	21	10
10. Taxes Paid PPH Inc. Tax " RE. 6095	1146	12
11. Losses by Fire, Storm, etc. (Explain in letter or rider)		
12. Bad Debts (Explain in letter or rider)		
13. Depletion (Explain in letter or rider)		
14. Other Deductions Authorized by Law (Explain in letter or rider)	1003	64
15. Total Deductions on Items 9 to 14	2180	22
16. Net Income (Item 8 minus Item 15)	27784	24

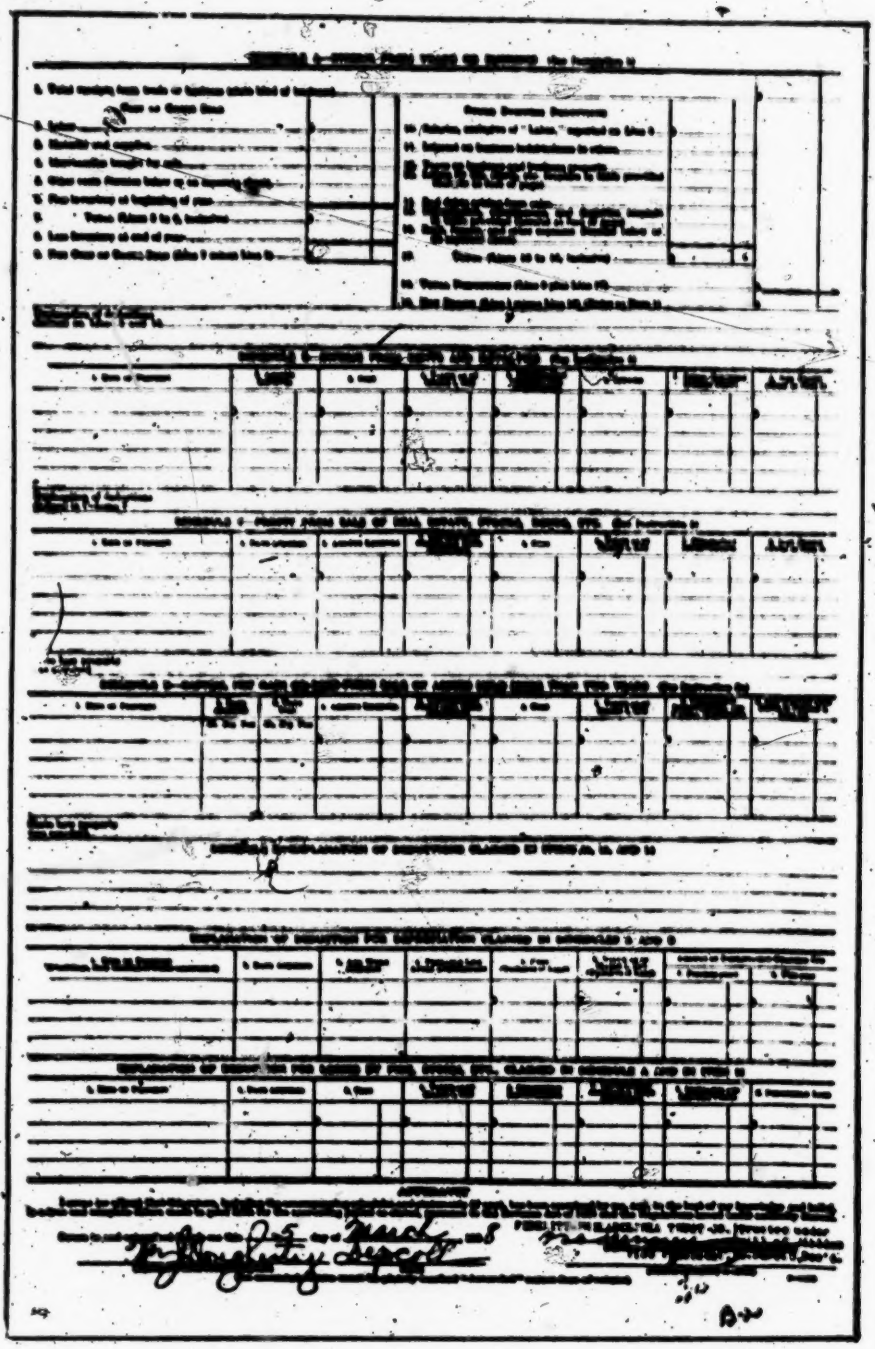
17. BENEFICIARIES' SHARES OF INCOME AND CREDITS (See Instruction 19)

Name and Address of Each Beneficiary	Is This Beneficiary a Resident or Non-Resident?	Amount of Income of Each Beneficiary (Item 16)	Proportion of Net Income Allowed Each Beneficiary	Computed Net Share of Each Beneficiary	Amount of Tax Due from Each Beneficiary	Amount of Tax Paid at Source on Each Beneficiary's Share
(a) Mary J. DuBois		$7/8 of Annuity of $4000.				
(b) c/o E. J. Levino & Co.		619	22	229	47	36
(c) 610 Fidelity Bldg., Philadelphia.						
(d) Exr. of Will of Mary J. DuBois	Balance of Income Collected by Exr.	4614	78	20 21	43	42
(e) Fidelity-Philadelphia Trust Co., Exrs.						
(f) 618 Second St., Philadelphia.					7	
(g)						
(h) Fidelity-Philadelphia Trust Co., Exr. of the Will of Mary C. DuBois, Dec'd 1/11/27	Balance of Income	3300	57	1275	17	72
(i)						
(j)						
(k)						
(l) Totals		8501		3237	107	10

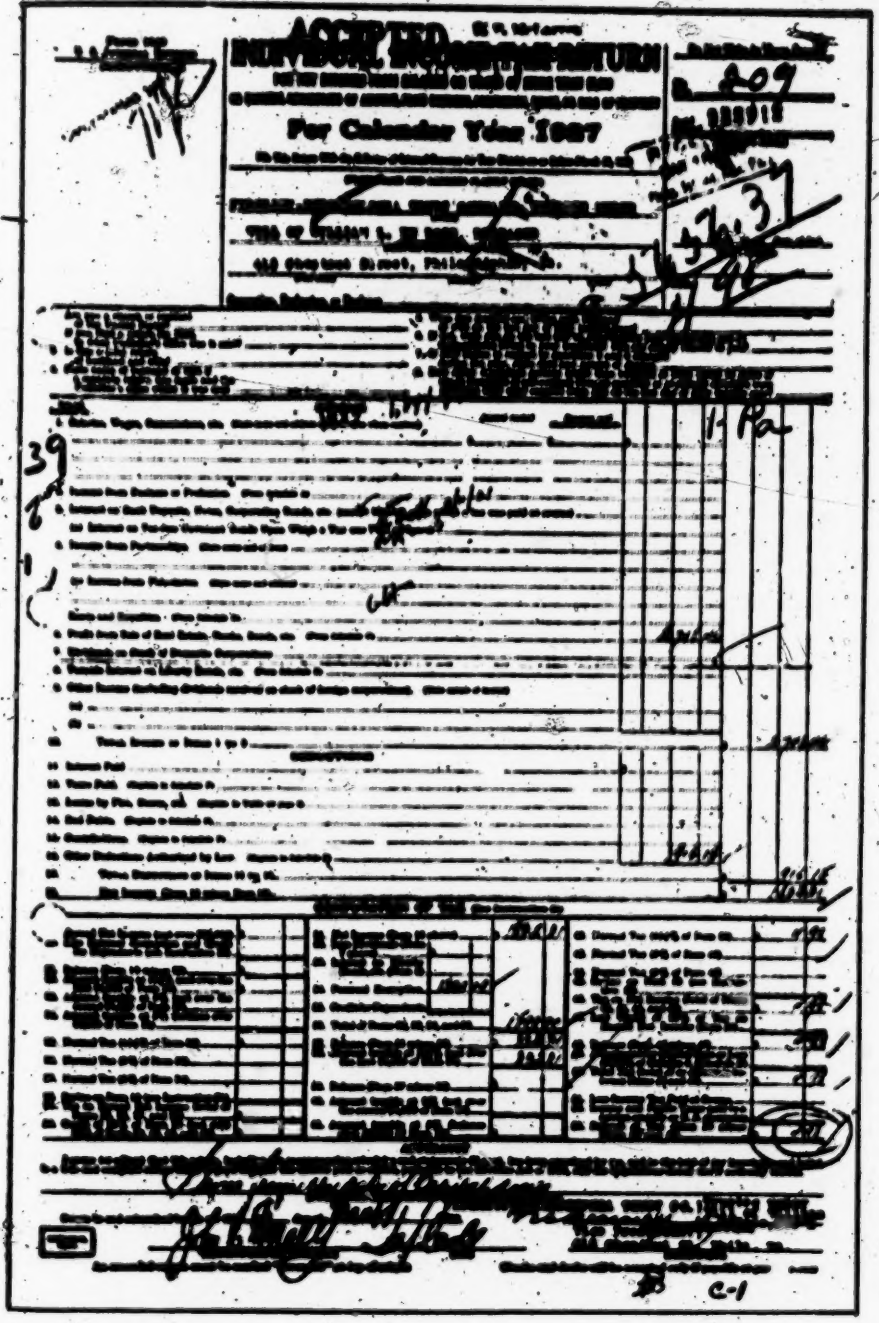
18. NONTAXABLE OBLIGATIONS, LIBERTY BONDS, ETC.

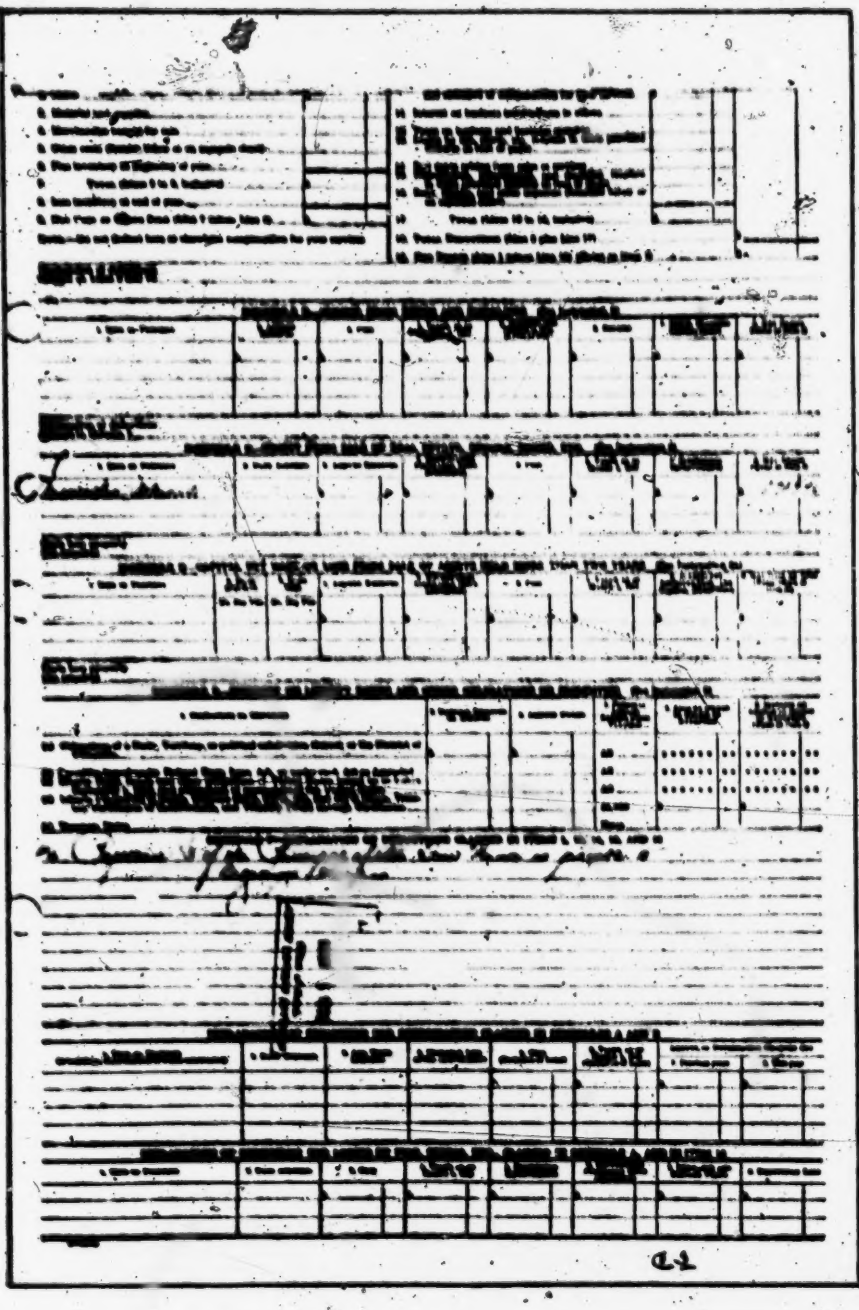
(a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	1	36 71
(b) Securities issued under the provisions of the Federal Farm Loan Act, or under such Act as amended		
(c) 3 Liberty 3½% Bonds and other obligations of United States issued before Sept. 1, 1917, and obligations of United States possessions	1	16
(d) 3 Liberty 4% and 4½% Bonds and other obligations of the United States issued after September 1, 1917	5	1037 61

13-1



RESPONDENT'S EXHIBIT "C." 81



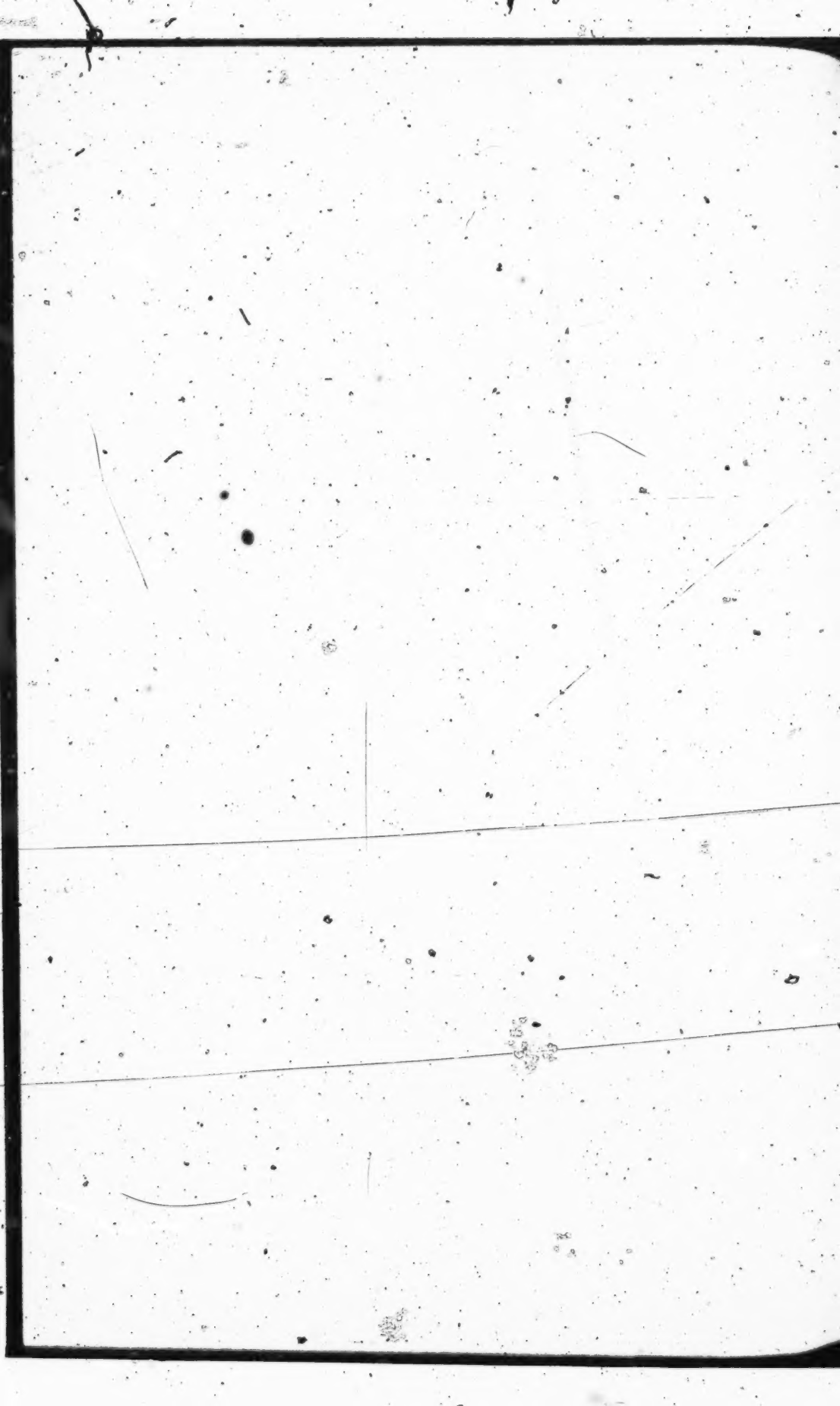


SALES FOR 1927

No. 2717 Account William L. Du Pont, dec'd. Capacity Trustee under Will

Description						
$2,000. Georgia ... Pwr.Co. 25 yr.1st. Con.6s due 3-1-46	2-26-27	$ 2,154.00	7-28-31	2,113.60		$2115.00
$10,000. Chic. Ill.& St. Paul Ry. Co.Gen.M. Con.6½'s due 5-1-00	3-19-27	9,464.00	10-26-29	8,300.00		8300.00
$5,000. Georgia Pwr.& Pwr.Co.5. C. Con.6's due 4-1-47	3-31-27	5,375.00	5-7-31	4,757.50		4757.50
$4,100.U.S.2nd L.I.Con.4½'s	9-18-27	4,117.16	(11-15-29 (5-24-32	4,075.80		4075.80
$5,000.U.S.2nd L.I.Con.4½'s	9-26-27	5,025.00	10-26-29	4,943.50		4943.50
$10,000. Penn Central Light & Pwr.Co. 1st & Ref.Mtge. Con. 6's due 12-1-43	12-1-27	10,300.00	(5-24-32 (11-15-29 (11-4-29	8,807.50		8807.50
		$ 38,735.16				$38988.70
				Net Profit	$ 32,748.46	

C-3



for and to control under their discretion the expenditure or accumulation for her benefit insofar as it may be necessary. . . .

"VII. In case of the decease of my said son and granddaughter without issue before my own decease, I give and bequeath the whole estate after the death of my wife, to the same charities and in the same proportions as enumerated in the residuary section VI, or in case of the decease of either of them, then the share appointed for the one so dying shall be paid or transferred to the said charities."

By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Mary C. DuBois, the widow, elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

During 1926 and 1927, the years involved in this proceeding, the trustee made payments to the widow as provided for under the will which amounts added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of the date of decedent's death under the Pennsylvania statutory provisions had she not elected to take under the will.

Mary C. DuBois, granddaughter of the decedent, died on August 26, 1924, while a minor, having no issue as of the date of her death, and never having had issue. Mary C. DuBois, the widow, died on November 22, 1927.

Petitioner for the year 1926 filed a form 1041 return only, and for the year 1927 petitioner filed a form 1041 return and a form 1040 return.

(Excerpts from transcript of record, January 28, 1932.)

Mr. PERRY. Your Honor, we submit a stipulation of facts that is agreeable to both parties.

The MEMBER. The stipulation may be filed as a part of the record.

[Blank.]

[Blank.]

Before United States Board of Tax Appeals

25 B.T.A.

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE UNDER THE WILL of William L. DuBois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DOCKET NOS. 48492, 51669. PROMULGATED APRIL 30, 1932

1. Where the widow elected to take under decedent's will in lieu of dower, held that income of the trust estate paid over to the widow

during the taxable years in accordance with the terms of the will is not deductible as a distribution of income to a beneficiary, within the provisions of section 219 (b) (2) of the Revenue Act of 1926. Julia Butterworth, et al., Trustees, 22 B. T. A. 899 followed.

2. Where one third of the corpus of the trust estate was, by the terms of decedent's will, given to charitable institutions after the widow's death but during her lifetime the income was payable to her, held, that the respondent did not err in failing to allow as a deduction on that account any portion of the income so paid to the widow during the taxable years.

Findings of fact and opinion

30 Robert T. McCracken, Esq., and John B. Peery, C. P. A., for the petitioner; Maxwell M. Mahony, Esq., for the respondent.

These proceedings, duly consolidated for hearing, are for the redetermination of deficiencies in income tax as follows:

Docket no.	Year	Deficiency
48492	1926	$900.79
51069	1927	1,044.97

In docket no. 48492, petitioner alleged in paragraph 4 (b) of its petition that, in determining the deficiency for the year 1926 respondent erred in computing a normal tax upon the sum of $3,740.42 representing dividends on stock of domestic corporations. At the hearing, respondent also confessed error on this point as alleged.

In docket nos. 48492 and 51069, covering the years 1926 and 1927, two substantially identical issues are raised by the pleadings and submitted for decision here, namely, (a) whether or not respondent erred in determining that income received during the taxable years and distributed to the widow under the terms of the decedent's will constitute capital expenditures, taxable to the trustee; and (b) in the event such income is held to be taxable to the trustee, whether or not the respondent erred in failing to allow as a deduction from gross income the amount thereof alleged to have been accumulated for the benefit of certain charitable institutions named in the decedent's will.

FINDINGS OF FACT

The petitioner, a Pennsylvania corporation, with its principal office at Philadelphia, is successor to the Philadelphia Trust Company, and the duly appointed qualified and acting trustee under the will of William L. DuBois, deceased. Decedent died testate
37 on October 26, 1918, while a resident of Pennsylvania. Decedent's will, dated December 14, 1915, with codicils thereto, provided, so far as pertinent here, as follows:

"VI. All the rest, residue, and remainder of my estate, real, personal, and mixed. . . . I give, devise and bequeath to my son, Henry

C. DuBois, and the Philadelphia Trust Company, in trust for the following uses, intents, and purposes, that is to say, to hold and invest the said trust estate either in the securities and other assets that I may leave or in such others as my trustees in their discretion may acquire, with the power to acquire real estate, and to alter, sell, change, and shift the investments, . . . releasing them from all liability to loss by reason of the exercise of this discretion; to collect the income and to pay first the sum of four thousand (4,000) dollars per annum to my son Henry C. DuBois, . . . until the death of his mother, and the balance to my wife, Mary C. DuBois, for and during all the term of her natural life, and upon her decease, . . . to continue the said trust estate for the following purposes, viz: . . . to pay two thirds of the income to my son Henry C. DuBois . . . for and during all the term of his natural life, and upon his decease to transfer, convey, and assign the portion of the trust estate thus directed to be held for him to such person or persons . . . or charities, and for such estate or estates as he, . . . shall by his last will and testament direct, limit, and appoint, . . . and in default of his exercise of his power of appointment, to transfer, convey, and assign the said portion to the children and issue of deceased children of my son Henry by representation . . . and in default of appointment and issue, then to the following charities in the proportions herein named: . . .

Pennsylvania Hospital	50%
The Presbyterian Orphanage	10%
The Presbyterian Hospital	15%
The Board of Foreign Missions for the Presbyterian Church	15%

38 As to the remaining one third of the income, I direct that it be accumulated during the minority of my granddaughter, Mary C. DuBois, the said accumulations not to be for her benefit except as to the allowance hereinafter provided, but to be paid from the time of my decease up to the time of her majority, or death if it occur earlier, with all accretions and increase, to the Pennsylvania Hospital as a gift to it; and from and after her majority, the said income shall be paid to her for and during the term of her natural life . . . and from and immediately after her decease then to transfer the principal upon which she had thus been appointed to receive the income, and which was held for her benefit, being the one-third part remaining of my residuary estate, to the children and remoter issue of my said granddaughter by representation, and in default of issues, then to the same charities and in the same proportions as already named in connection with my said son Henry's share; provided that a sum not exceeding three thousand (3,000) dollars per annum out of the income may be expended or accumulated for her benefit during her minority, should that amount be required for the purpose, and I appoint Henry C. DuBois and the Philadelphia Trust Company to be her guardians to arrange for and to control under their discretion the expenditure or accumulation for her benefit inso-far as it may be necessary. . . .

"VII. In case of the decease of my said son and granddaughter without issue before my own decease, I give and bequeath the whole estate after the death of my wife, to the same charities and in the same proportions as enumerated in the residuary section VI, or in case of the decease of either of them, then the share appointed for the one so dying shall be paid or transferred to the said charities."

By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Mary C. DuBois, the widow, elected to take
39 under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

During 1926 and 1927, the years involved in this proceeding, the trustee made payments to the widow as provided for under the will, which amounts, added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of
41 the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

Mary C. DuBois, a granddaughter of the deceased, died on August 26, 1924, while a minor, having no issue as of the date of her death, and never having had issue. Mary C. DuBois, the widow died on November 22, 1927.

Petitioner for the year 1926 filed a form 1041 only, and for the year 1927 petitioner filed a form 1041 return and a form 1040 return.

For the year 1926, no form 1040 return was filed by the petitioner, and no tax was paid. The form 1041 return filed by the petitioner for the year 1926 disclosed the following:

Income:		
Interest	$25,021.68	
Dividends	4,346.00	
		$29,367.68
Deductions:		
Taxes and other deductions		2,678.01
Net income		$26,689.67
Distributed:		

	Dividends	Other income	Total
Henry DuBois (son)	$368.38	$3,043.33	$3,402.11
Mary C. DuBois (widow)	3,748.42	19,281.14	23,027.56
	$4,346.00	$22,343.67	$26,689.67

40 For the year 1927 a form 1040 return was filed by the petitioner, which reflected the following computation of tax:

Income: Profit sale of stocks	$2,748.46
Deduct: "Proportion ⅓ of the principal of this trust fund is payable to organized charities"	916.15
Net income	$1,832.31
Tax payable (and paid thereon)	4.96

The petitioner also filed a form 1041 return for the year 1927, which disclosed the following:

Income:		
Interest	$24,951.46	
Dividends	5,014.00	
		$29,965.46
Deductions:		
Interest, taxes and other deductions		2,180.97
Net income		$27,784.59

Distributed:

	Dividends	Other income	Total
Henry C. DuBois	$819.00	$2,797.40	$3,616.40
Est. of will of Mary C. DuBois (ben. income collected to 11-22-27)	4,014.00	18,077.43	22,091.43
P. P. Co. est. will of Mary C. DuBois, dec'd (income accrued to 11-27-27)	180.57	1,000.00	2,276.25
	$5,014.00	$22,770.59	$27,784.59

OPINION

TRAMMELL: During the taxable years the petitioner trustee paid over to the decedent's widow income from the corpus of the trust estate in accordance with directions contained in the will. The widow elected to take under the will in lieu of her statutory dower interest. The amount so paid to the widow in the taxable years, together with the amounts paid to her in prior years, did not equal the value of her dower interest at the date of decedent's death, thereafter surrendered by her. Respondent in computing the deficiencies, disallowed as deductions from the petitioner's gross income the amounts so paid to the widow during the taxable years. The corrections of this action of the respondent is the basis of the first issue presented for consideration here.

The amounts of said income of the trust estate so paid to the widow are claimed by the petitioner as deductions under section 219 (b) (2) of the Revenue Act of 1926, the provisions of which are the same as those of section 219 (b) (2) of the Revenue Act of 1924. The decedent died a resident of Pennsylvania.

In Julia Butterworth et al., Trustees, 23 B.T.A. 839, the decedent died testate in 1925, while a resident of Pennsylvania, and the widow in that case elected to take under the will in lieu of dower. In the taxable years 1924 and 1925 the trustees under the decedent's will paid over to the widow the sums to which she was entitled under the will and claimed deductions therefor in computing the net income of the testamentary trust. The amounts so paid to the widow, plus the amounts similarly paid to her in previous years, were not
41 equal to the value of the lower interest that she relinquished by electing to take under the will. We held that the amounts so paid to the widow were paid to her in satisfaction of her dower right and were not distributions of income within the meaning of

section 219 (b) (2) of the Revenue Act of 1924, and hence not deductible in computing net income of the trust. To the same effect see also Frank Parlee et al., Trustees, 23 B.T.A. 846.

The question presented in the case at bar is the same as that considered and decided by us adversely to the petitioner's contention in the cases above referred to, and both the law and the facts in all essential respects are identical. Accordingly, on authority of those decisions, the respondent's action on the first issue here is approved.

The second issue raised by the petitioner involves the question whether the respondent erred in denying as deductions amounts equal to one third of the income of the trust paid to the widow in the taxable years, one third of the corpus being payable, after the death of the widow, to certain charitable institutions. This issue also, we think, must be decided against the petitioner.

In paragraph VI of his will, decedent devised and bequeathed the residue of his estate to the trustee, for the purpose, among other things, to collect the income and pay first the sum of $4,000 per annum, to decedent's son, Henry, until the death of his mother, and the balance of the income to the decedent's wife (widow) "for and during all the term of her natural life." Upon the death of the widow two thirds of the income was to be paid to the son for and during the term of his natural life. The remaining one third of the income, after the death of the widow, was to be accumulated during the minority of the decedent's granddaughter, and this accumulated income upon the happening of certain contingencies, was to be given to the Pennsylvania Hospital. The principal, consist-
43 ing of one third of the decedent's residuary estate, or corpus of the trust, after the decease of the granddaughter, was to be transferred to the granddaughter's children, if any, but in default of such issue, was to go to certain designated charities.

By these provisions of the will, the entire income from the decedent's residuary estate, which constituted the corpus of the trust, less $4,000 per annum given to the son, was payable to the widow for and during the term of her natural life. It follows that during the widow's lifetime, the charitable institutions were not entitled to receive any portion of the income. Upon the death of the granddaughter in 1924 without issue, the contingent interest of the charities in the one-third part of the residuary estate became vested, but such institutions still were not entitled to receive any income therefrom until after the death of the widow. The amounts of income from the trust estate, paid over to the widow during the taxable years in accordance with the terms of the will do not, therefore, constitute income accumulated for the benefit of or in any event payable to the charitable institutions, and hence are not deductible from gross income in computing the net income of the trust estate. The respondent's action on this point is approved.

In docket no. 48492, judgment will be entered under rule 50.

In docket no. 51669, judgment will be entered for the respondent.

44 Before United States Board of Tax Appeals, Washington

Docket No. 48492

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE U/W WILLIAM L. DuBois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Entered June 3, 1932

Pursuant to findings of fact and opinion promulgated April 30, 1932, the respondent and the petitioner herein, to wit, on March 26, 1932, having filed an agreed proposed redetermination under rule 50 for the year 1926, it is

Ordered and decided that there is a deficiency for the year 1926 in the amount of $718.44.

(Sgd.) CHARLES M. TRAMMELL, *Member.*

45 Before United States Board of Tax Appeals, Washington

Docket No. 51669

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE U/W OF William L. Dubois, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Entered May 4, 1932

Pursuant to the determination of the Board, as set forth in its report promulgated April 30, 1932, it is

Ordered and decided: That there is a deficiency of $1,044.97 for the year 1927.

(Sgd.) CHARLES M. TRAMMELL, *Member.*

46 In United States Circuit Court of Appeals, for the Third Circuit

B.T.A. Docket Nos. 48492 and 51669

[Title omitted.]

Petition for Review of Decision of the United States Board of Tax Appeals

Filed June 13, 1932

To the Honorable the Judges of Said Court:

Your petitioner respectfully represents:

1. That it is a corporation duly organized under the laws of the State of Pennsylvania having its principal office at 135 South Broad Street, in the city of Philadelphia, Pennsylvania, in the third circuit, and files this petition for review by the United States Circuit Court of Appeals for the Third Circuit at Philadelphia.

2. This appeal involves an alleged deficiency in income tax for the taxable year 1927 in the sum of $1,044.97, and $718.44 for the year 1926.

3. William L. DuBois dies testate on October 26, 1918, a resident of Pennsylvania, and by his will he appointed Philadelphia Trust Company as trustee under his will. Your petitioner is the successor of the Philadelphia Trust Company and is now trustee of the estate of said decedent.

47 4. The will of said decedent provided, in part, as follows:

"VI. All the rest, residue, and remainder of my estate, real, personal, and mixed . . . I give, devise, and bequeath to my son, Henry C. DuBois, and the Philadelphia Trust Company, in trust for the following uses, intents, and purposes, that is to say, to hold and invest the said trust estate either in the securities and other assets that I may leave or in such others as my trustees in their discretion may acquire, with the power to acquire real estate, and to alter, sell, change, and shift the investments, . . . releasing them from all liability to loss by reason of the exercise of this discretion; to collect the income and to pay first the sum of four thousand (4,000) dollars per annum to my son Henry C. DuBois, . . . until the death of his mother, and the balance to my wife, Mary C. DuBois, for and during all the term of her natural life, and upon her decease, . . . to continue the said trust estate for the following purposes, viz: . . . to pay two thirds of the income to my son Henry C. DuBois . . . for and during the term of his natural life, and upon his decease to transfer, convey, and assign the portion of the trust estate thus directed to be held for him to such person or persons . . . or charities, and for such estate or estates as he, . . . shall by his last will and testament direct, limit, and appoint, . . . and in default of his exercise of his power of appointment, to transfer, convey, and assign the said portion to the children and issue of deceased children of my son Henry by representation . . . and in default of appointment and issue, then to the following charities in the proportions herein named:

Pennsylvania Hospital	55%
The Presbyterian Orphanage	15%
The Presbyterian Hospital	15%
The Board of Foreign Missions of the Presbyterian Church	15%

48 As to the remaining one third of the income, I direct that it be accumulated during the minority of my granddaughter, Mary C. DuBois, the said accumulations not to be for her benefit except as to the allowance hereinafter provided, but to be paid from the time of my decease up to the time of her majority, or death if it occur earlier, with all accretions and increase, to the Pennsylvania Hospital as a gift to it; and from and after her majority, the said income shall be paid to her for and during the term of her natural life . . . and from and immediately after her decease then to transfer the principal upon which she had thus been appointed to receive the income, and which was held for her benefit, being the one third part remaining of my residuary estate, to the children and remoter issue of my said granddaughter by representation, and in default of issues, then to the same charities and in the same proportions as already named in connection with my said son Henry's share; provided that a sum not exceeding three thousand (3,000) dollars per annum out of the income may be expended or accumulated for her benefit during her minority, should that amount be required for the purpose, and I appoint Henry C. DuBois and the Philadelphia Trust Company to be her guardians to arrange for and to control under their discretion the expenditure or accumulation for her benefit in so far as it may be necessary. . . .

"VII. In case of the decease of my said son and granddaughter without issue before my own decease, I give and bequeath the whole estate after the death of my wife, to the same charities and in the same proportions as enumerated in the residuary section VI, or in case of the decease of either of them, then the share appointed for the one so dying shall be paid or transferred to the said charities."

5. By writing signed, acknowledged, and delivered to the executors of the decedent and duly filed and recorded as required by the
49 statutes of Pennsylvania, Mary C. DuBois, the widow of the said decedent, elected to take under the will in lieu of the interest allowed her in decedent's estate by the law of Pennsylvania.

6. During the years 1926 and 1927 the trustee made payments to the widow as provided for under the will which amounts added to payments for prior years did not aggregate a sum equal to that which would have been apportionable to her as of the date of the decedent's death under the Pennsylvania statutory provisions had she not elected to take under the will.

7. Mary C. DuBois, a granddaughter of the deceased, died on August 26, 1924, while a minor having no issue as of the date of her death and never having had issue. Mary C. DuBois, the widow, died November 22, 1927.

8. For the year 1926 your petitioner filed no form 1040 return, but filed a form 1041 for the year 1926 which disclosed the following:

Income:		
Interest	$95,001.78	
Dividends	4,846.00	
		$99,847.78
Deductions:		
Taxes and other deductions		2,678.01
Net income		$96,969.77
Distributed:		

	Dividends	Other income	Total
Henry DuBois (son)	[illegible]	[illegible]	[illegible]
Mary C. DuBois (widow)	[illegible]	[illegible]	[illegible]
	$4,846.00	$92,843.87	$96,689.87

50 9. For the year 1927 your petitioner filed a form 1040 return which reflected the following computation of tax:

Income: Profit sale of stock	$2,738.40
Deduct: "Proportion ⅙ of the principal of this trust fund is payable to Organized Charities"	916.15
Net income	$1,822.31
Tax payable (and paid thereon)	4.08

and a 1041 return which discloses the following:

Income:		
Interest	$94,951.46	
Dividends	5,014.00	
		$99,965.46
Deductions:		
Interest taxes and other deductions		2,180.87
Net income		$97,784.59
Distributed:		

	Dividends	Other income	Total
Henry C. DuBois	$819.00	$3,797.40	$3,616.40
Exr. of will of Mary D. DuBois (bal. income collected to 11-22-27)	4,014.40	18,077.42	22,091.82
E. P. Co. exr. will of Mary C. DuBois, dcsd. Income accrued to 11/27/27	280.87	1,806.68	2,276.35
	$5,014.00	$23,770.59	$27,784.59

10. That the Commissioner of Internal Revenue mailed to your petitioner deficiency letters giving notice of an alleged deficiency in income tax for the year 1926 in the amount of $905.76 and
51 for the year 1927 in the amount of $1,044.97 with interest on the ground that your petitioner should include in taxable income payments made out of the income of this trust to the beneficiaries under the above quoted portions of the will of the decedent without any deductions by reason of such payments or by reason

of the charitable remainders set up in the above will. Within sixty days from the date of said respective deficiency letters your petitioner appealed from the aforesaid determination of the Commissioner of Internal Revenue to the United States Board of Tax Appeals.

11. By order of the Board of Tax Appeals said two cases involving the years 1926 and 1927 were consolidated and were heard together and a single decision rendered therein.

12. On April 30, 1932, the United States Board of Tax Appeals entered its decision denying the appeal of your petitioner as to the years 1926 and 1927, and on May 4, 1932, entered judgment in the amount of $1,044.07 with interest against your petitioner as a deficiency of income tax for the year 1927, and on June 3, 1932, entered further judgment in the amount of $718.44 with interest against your petitioner as a deficiency of income tax for the year 1926.

13. That your petitioner believes that under paragraph 219 (b) (2) of the Revenue Act of 1926 your petitioner should be allowed as a deduction in computing the net income of this estate for the years 1926 and 1927, respectively, the amount of the income of the trust which was currently distributed by your petitioner to the beneficiaries.

14. Your petitioner further believes that if its first contention is not sustained it must be concluded that the income from this trust to the extent of one third thereof is being accumulated for
52 charitable purposes and is, therefore, not subject to the payment of income tax.

Wherefore your petitioner appeals to this honorable court and prays this honorable court to review the decision of the United States Board of Tax Appeals entered on April 30, 1932, and the judgments entered thereon on May 4, 1932, and June 3, 1932, and prays that the judgment of the United States Board of Tax Appeals be set aside and reversed, and files herewith the assignments of error attached hereto which are incorporated as a part of this petition.

And your petitioner will ever pray, etc.

FIDELITY-PHILADELPHIA TRUST COMPANY,
Trustee of the Estate of William L. DuBois, Deceased,
By T. E. FRAME, *Vice President.*

[*Duly sworn to by T. E. Frame; jurat omitted in printing.*]

53 *Assignments of error*

And now, to wit, June 8, 1932, comes Fidelity-Philadelphia Trust Company, trustee of the estate of William L. DuBois, deceased, petitioner and appellant in the foregoing petition, by its attorney, Robert T. McCracken, and makes the following assignments of error:

1. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"The question presented in the case at bar is the same as that considered and decided by us adversely to the petitioner's contention in the cases above referred to, and both the law and the facts in all essential repects are identical."

2. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"Accordingly, on authority of those decisions, the respondent's action on the first issue here is approved."

3. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"This issue also, we think, must be decided against the petitioner."

4. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"By these provisions of the will, the entire income from the decedent's residuary estate, which constituted the corpus of the trust, less $4,000 per annum given to the son, was payable to the widow for and during the term of her natural life. It follows that during the widow's lifetime, the charitable institutions were not entitled to receive any portion of the income."

5. The United States Board of Tax Appeals erred in holding in its opinion as follows:

54 "Upon the death of the granddaughter in 1924, without issue, the contingent interest of the charities in the one third part of the residuary estate became vested, but such institutions still were not entitled to receive any income therefrom until after the death of the widow."

6. The United States Board of Tax Appeals erred in holding in its opinion as follows:

"The amounts of income from the trust estate, paid over to the widow during the taxable years in accordance with the terms of the will do not, therefore, constitute income accumulated for the benefit of or in any event payable to the charitable institutions, and hence are not deductible from gross income in computing the net income of the trust estate. The respondent's action on this point is approved."

7. The United States Board of Tax Appeals erred in entering final judgment for the Commissioner of Internal Revenue as follows:

"Pursuant to the determination of the Board, as set forth in its report promulgated April 30, 1932, it is ordered and decided: That there is deficiency of $1,044.97 for the year 1927."

8. The United States Board of Tax Appeals erred in entering final judgment for the Commissioner of Internal Revenue as follows:

"Pursuant to findings of fact and opinion promulgated April 30, 1932, the respondent and the petitioner herein, to wit, on March 26, 1932, having filed an agreed proposed redetermination under Rule 50 for the year 1926, it is ordered and decided that there is a deficiency for the year 1926 in the amount of $718.44."

9. The United States Board of Tax Appeals erred in failing
55 to hold, in accordance with the contention of your petitioner, that your petitioner should be allowed a deduction in computing taxable income of this estate of the amount of income paid to beneficiaries in accordance with the terms of the trust.

10. That the United States Board of Tax Appeals having disregarded the foregoing contention of your petitioner erred in failing to hold that one third of the income of this trust was accumulated for charitable purposes and should, therefore, be deducted in determining the net taxable income of the estate.

ROBERT T. MCCRACKEN,
Attorney for Appellant.

Before U.S. Board of Tax Appeals

Pracipe for record on appeal

Filed June 13, 1932

To the Clerk of the United States Board of Tax Appeals:

Kindly certify, as part of the record on appeal in the above case, the following:

1. Docket entries.
2. Petitions to the Board of Tax Appeals for redetermination of the rulings of the Commissioner with amendments.
3. Answers of the Commissioner.
4. Motion to consolidate cases, docket nos. 48492 and 51669, and order granting same January 25, 1932.
5. Stipulation of facts submitted by the parties with the exhibit thereto.

56 6. Decision, finding, and opinion of the Board dated April 30, 1932.

7. Final decisions of the Board entered May 4, 1932, as to the year 1927, and June 8, 1932, as to the year 1926.
8. Petition to the United States Circuit Court of Appeals for the Third Circuit to review the decision of the Board.
9. Assignments of error.
10. This praecipe.

ROBERT T. MCCRACKEN,
Attorney for Petitioner.

[Clerk's certificate to foregoing transcript omitted in printing.]

57 [Minute entry of argument and submission, Oct. 6, 1932, omitted in printing.]

58 In United States Circuit Court of Appeals for the Third Circuit

October term, 1932

No. 4964

FIDELITY PHILADELPHIA TRUST COMPANY, TRUSTEE UNDER THE WILL of William L. DuBois, Deceased, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review from the United States Board of Tax Appeals

Opinion

Filed March 4, 1933

Before WOOLLEY, DAVIS and THOMPSON, Circuit Judges

WOOLLEY, Circuit Judge: William L. DuBois, a resident of Pennsylvania, died in 1918. By his will he bequeathed the bulk of his estate in trust to predecessors of the petitioner, now the sole trustee, and provided that they should collect the income and pay annually the sum of $4,000 to his son until the death of his mother, and
59 pay the balance to his (the testator's) wife for life, and on her death to pay two thirds of the income to his said son for life, and thereafter distribute two thirds of the principal of the estate as the son should appoint, or, failing appointment and issue, to named charities; and as to the remaining one third of the estate, to pay the income to his granddaughter for life, with remainders over to her issue or, issue failing, to named charities.

The testator's wife elected to take under the will in lieu of the interest in her husband's estate which the law of Pennsylvania gave her.

During 1926 and 1927, the tax years in question, the trustee made payments of income to the widow in amounts which, together with payments made in other years, were not equal to the value of her statutory interest in her husband's estate, had she elected to take against the will. In 1924, the testator's granddaugher died while a minor and without issue. His wife died in 1927.

In computing taxable net income in its return for the stated tax years, the trustee deducted the income it had distributed to the widow under what it conceived to be authority conferred by section 219 of the Revenue Act of 1926 (44 Stat). The Commissioner of

Internal Revenue, being influenced by the decisions in Warner v. Walsh, 15 Fed. (2d) 807; United States v. Bolster, 26 Fed. (2d) 760 and Allen v. Brandeis, 29 Fed. (2d) 868, disallowed the deductions and assessed deficiency taxes against the trustee. On appeal the United States Board of Tax Appeals sustained the Commissioner on authority of its decision in Julia Butterworth, et al., Trustees, 28 B.T.A. 889. The case is in this court on the trustee's petition to review the action of the Board.

Two questions were decided by the Board and the same questions are submitted here. The first—the right of a trustee, under (a) the statute, in computing taxable income, to deduct income distributed, after her election, to a widow as beneficiary—is the question which was submitted and decided in different ways by the Board and by this court in Butterworth v. Commissioner, Fed. (2d) . The other arises out of provisions in the DuBois will for limitations over to charities, and in substance is, whether the Commissioner erred in disallowing the trustee's deductions in amounts at least equal to one third of the income of the trust paid to the widow, in view of the provision that one third of the corpus of the estate should, after the death of both his wife and granddaughter, be paid to named charities. The Board sustained the Commissioner's disallowance of deductions on both points, the practical effect of which was to place in some measure a tax burden upon the widow, who was exempt under the cited decisions, and upon remaindermen, in this case charities, which otherwise are exempt under the law.

Our decision on the first question will make consideration of the second unnecessary. We hold that the decision in Butterworth, et al. v. Commissioner, Fed. (2d) , rules the instant case and, accordingly, calls for a reversal of the judgments of the Board of Tax Appeals in the two appeals there consolidated and heard together.

Thomrson, Circuit Judge, dissenting.

A true copy.

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

61 In United States Circuit Court of Appeals for the Third Circuit

October term, 1932

No. 4964

FIDELITY-PHILADELPHIA TRUST CO., TRUSTEE UNDER WILL OF WILLIAM L. DUBOIS, deceased, petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment filed March 4, 1933

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same are hereby reversed.

Philadelphia, March 4, 1933.

WILLIAM H. WOOLLEY, *Circuit Judge.*

[File endorsement omitted.]

62 [Clerk's certificate to foregoing transcript omitted in printing.]

63 Supreme Court of the United States

Order Allowing Certiorari.

Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File no. 37674. U.S. Circuit Court of Appeals, Third Circuit. Term no. 76. David Burnet, Commissioner of Internal Revenue, petitioner, vs. Fidelity-Philadelphia Trust Company, Trustee under the Will of William L. DuBois, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed May 17, 1933. No. 76, O.T. 1933.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. —

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE Under the Will of William L. DuBois, Deceased

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of David Burnet, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in the above cause on March 4, 1933, reversing a decision of the Board of Tax Appeals (R. 59).

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 35) is reported in 25 B.T.A. 1359. The opinion of the Circuit Court of Appeals (R. 57) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered March 4, 1933 (R. 59). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to deduct, in computing the net income of the trust, amounts which are distributed to the testator's widow who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the decedent's estate.

STATEMENT

The material facts, as stipulated and found by the Board (R. 22, 36), may be summarized as follows:

The respondent is a Pennsylvania corporation and is the successor of the Philadelphia Trust Company as trustee under the will of William L. DuBois, deceased, who died testate a resident of Pennsylvania on October 26, 1918 (R. 22). By his will the decedent left all of his estate, both real and personal, in trust, with directions to pay out of the income therefrom $4,000 per year to his son and the balance to his wife during her lifetime (R. 22–23). The widow elected to take under the will. The amounts paid her by the respondents in 1926 and

1927, the tax years here involved, together with those paid in previous years, did not aggregate in amount the value of the interest to which she would have been entitled had she taken against the will.

In computing the taxable income of the estate for the years involved the respondent deducted from gross income the amounts distributed to the widow. The Commissioner disallowed the deduction thus claimed and asserted deficiencies accordingly. The Board of Tax Appeals approved the Commissioner's action. The court below reversed, one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions were of income *qua* income and that the widow was with respect to these distributions a true beneficiary.

2. The Circuit Court of Appeals erred in holding that income, distributed by a testamentary trustee to a widow who has elected to take under the will, is deductible by the trustee although it is not taxable to the widow, thus creating an exemption not contemplated by the revenue statutes.

3. The Circuit Court of Appeals erred in deciding that the amounts distributed by the respondent to the widow in pursuance of the terms of the testamentary trust were deductible by the trustees.

4. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

This case presents the precise question involved in *David Burnet* v. *Julia Butterworth*, pending before this Court as No. —, October Term, 1932. The reasons relied upon as justifying the issue of the writ are presented in the petition in the *Butterworth case*, to which this Court is respectfully referred.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

MAY 1933.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 76

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE UNDER THE WILL OF WILLIAM L. DuBOIS, deceased

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 14) is reported in 25 B.T.A. 1359. The opinion of the Circuit Court of Appeals (R. 26) is reported in 63 F. (2d) 949.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 4, 1933 (R. 28). The petition for a writ of certiorari was filed May 17, 1933, and

was granted May 29, 1933 (R. 28). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interest in the testator's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 5–6.

STATEMENT

The material facts, as stipulated and found by the Board (R. 11–13, 14–17), may be summarized as follows:

The respondent is a Pennsylvania corporation and is the successor of the Philadelphia Trust Company as trustee under the will of William L. DuBois, deceased, who died a resident of Pennsylvania on October 26, 1918. (R. 11.) By his will the testator left all of his estate, both real and personal, in trust, with directions to pay out of the income therefrom $4,000 per year to his son and the balance to his wife during her lifetime, thereafter the son to receive a two-thirds life interest, with a power of appointment over the remainder.

(R. 11–12.) The widow elected to take under the will. The amounts paid her by the respondents in 1926 and 1927, the tax years here involved, together with those paid in previous years, did not aggregate in amount the value of the interest to which she would have been entitled had she taken against the will. (R. 13.)

In computing the taxable income of the estate for the years involved the respondent deducted from gross income the amounts distributed to the widow. The Commissioner disallowed the deduction thus claimed and asserted deficiencies accordingly. (R. 4–6, 8–10.) The Board of Tax Appeals approved the Commissioner's action. The court below reversed, one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions were of income as such and that the widow was with respect to these distributions a true beneficiary.

2. The Circuit Court of Appeals erred in holding that income, distributed by a testamentary trustee to a widow who has elected to take under the will, is deductible by the trustee although it is not taxable to the widow, thus creating an exemption not contemplated by the revenue statutes.

3. The Circuit Court of Appeals erred in deciding that the amounts distributed by the respondent to the widow in pursuance of the terms of the testamentary trust were deductible by the trustees.

4. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

ARGUMENT

This case presents the precise question involved in *Commissioner* v. *Julia Butterworth,* pending before this Court as No. 75, October Term, 1933. The Court is respectfully referred to the argument and authorities presented in that brief.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed, unless it be concluded that the income in question is taxable in full to the widow.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ERWIN N. GRISWOLD,
SEWALL KEY,
WM. CUTLER THOMPSON,
Special Assistants to the Attorney General.

OCTOBER 1933.

APPENDIX

STATUTES INVOLVED

REVENUE ACT OF 1926, C. 27, 44 STAT. 9

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct; * * *.

* * * * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to

them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year; * * * (U.S.C. App., Title 26, Sec. 960).

PURDON'S PENNSYLVANIA STATUTES ANNOTATED, TITLE 20, DECEDENTS' AND TRUST ESTATES

SEC. 31. *Widow's share in lieu of dower.* The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law, so far as relates to land of which the husband died seised; and her share in lands aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in lands of which the husband died seised. * * * (1917, June 7, P.L. 429, § 3.)

SEC. 261. *Spouse can elect to take against will.*—When any person shall die testate, leaving a surviving spouse who shall elect to take against the will; such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate: * * *. (1917, June 7, P.L. 403, § 23 [a].)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 76.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

FIDELITY-PHILADELPHIA TRUST COMPANY, Trustee Under the Will of William L. DuBois, deceased.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

ULRIC J. MENGERT,
ROBERT T. McCRACKEN,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 76.

Guy T. Helvering, Commissioner of Internal Revenue, petitioner,

v.

Fidelity-Philadelphia Trust Company, Trustee Under the Will of William L. DuBois, deceased.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 13) is reported in 25 B. T. A. 1359. The opinion of the Circuit Court of Appeals (R. 26) is reported in 63 F. (2d) 949.

SUMMARY OF ARGUMENT.

I. Respondent agrees with petitioner that the payments to the widow were income to her. One alternative of petitioner's argument is that the return of "capital" theory applied to the taxation of the widow is wrong and that she should be taxed on the payments received by her from the trustee. Both petitioner and respondent hold that the payments by the trustee to the widow were income to her and therefore were proper deductions for the trustee, and on that ground ask an affirmance of the judgment below.

II. Petitioner wrongly concludes that the theory of a return of "capital" to the widow requires the reversal of the judgment below. The other of petitioner's alternative contentions is that the adoption of the return of "capital" theory, with its exemption of the widow from tax liability on the payments received from the trustee, requires the disallowance of the payments as deductions in computing the fiduciary's tax liability. This the respondent contends is an unwarranted extension of the return of "capital" theory and is contrary to the statute and leads to an incongruous and impossible situation. Whatever aspect the payments may have from the widow's standpoint, they must necessarily be income from the trustee's standpoint. The payments by the trustee to the widow are from the standpoint of the trustee income paid to a beneficiary and are allowable deductions under the statute.

ARGUMENT.

I. Respondent agrees with petitioner that the payments to the widow were income to her.

The brief for petitioner presents alternative contentions. It asks that the judgment of the court below should be reversed, unless it be concluded that the income in question is taxable in full to the widow. In point III of his argument (brief in *Butterworth* case, No. 75, pp. 18-25), petitioner states that the original position of the Government was that these payments by a trustee to a widow were income to the widow and that the trustee should be entitled to deduct the payments so made. That position the Government felt obliged to abandon because of the decision in *Warner* v. *Walsh,* 15 F. (2d) 367 (1926) (C. C. A. 2); *United States* v. *Bolster,* 26 F. (2d) 760 (1928) (C. C. A. 1), and *Allen* v. *Brandeis,* 29 F. (2d) 363 (1928) (C. C. A. 8).

The Government still feels, however, that its original position was correct and in support of that position it cites *People* ex rel. *Kight* v. *Lynch,* 255 N. Y. 323 (1931), and *Title Guarantee Loan and Trust Co.* v. *Commissioner,* 63 F. (2d) 621 (1933) (C. C. A. 5), now pending before this Court as *Helvering* v. *Title Guarantee Loan & Trust Co.,* No. 78, present term. Petitioner in his brief cites extended passages from the opinions in those two cases and states that the reasoning is so conclusive that petitioner adopts it and presents it as his argument on the question.

Our brief in this case in the court below cited the

Kight case and quoted at length from the opinion therein. We too believe that the amounts received by a widow from a trust set up for her under the will of her husband are income to the widow even before the value of her statutory rights has been received by her. We think the reasoning in the *Kight* case and in the *Title Guarantee Loan & Trust Co.* case is unassailable. We urged the principle which they adopt upon the court below when this case was there argued.

The court below did not reject that principle in its decision of the present case. It preferred to place its decision upon a different ground, as is indicated by Judge Woolley who wrote the opinion of the court in this and in the companion case of *Butterworth* v. *Commissioner,* 63 F. (2d) 944 (1933), now in this Court as *Helvering* v. *Butterworth,* No. 75, present term. At 63 F. (2d) 946, he said:

> "It should be noted that the first question submitted to us—whether payments to the widow, after election, of income from a trust constitutes a return of capital and therefore is not taxable—is the same question submitted to and decided by the three Circuit Courts of Appeals. An altogether different question before this court—one to which the widow, now exempt, is not a party—is whether the fiduciaries of the trust in returning income may deduct what they had distributed to the widow as a beneficiary and thus avoid taxes against themselves for that amount? As the first question is not before this court, we shall, of course, not pass upon it. The

second submitted question is stated as a corollary of the first. We shall not discuss it—except casually in connection with another phrase of the case. We shall, however, assume without deciding that the way in which the Circuit Courts of Appeals decided the question before them was right. We shall also assume that those courts, not having before them the question which is before this court, did not rule on that question. It follows that the three cited decisions do not rule this case either on facts or in law and are present only because of the trouble they have made in the collection of taxes and are pertinent only as the trend of their reasoning may, logically, influence an interpretation of the provision of the Revenue Acts in respect to deductions by fiduciaries in making the tax returns now under review."

If this Court, however, wishes to affirm the judgment of the court below on the reasoning of the *Kight* case and the *Title Guarantee Loan & Trust Co.* case, we have no objection thereto.

II. Petitioner wrongly concludes that the theory of a return of "capital" to the widow requires the reversal of the judgment below.

Petitioner's alternative argument is that the return of "capital" theory adopted by three Circuit Courts of Appeal, relieving the widow from taxation as it does, must of necessity prevent the fiduciary from claiming the deduction for which the respondent contends in this case. This argument of petitioner is not founded upon a valid basis.

The return of "capital" theory is one that was adopted and applied by the three Circuit Courts of Appeal in the cases referred to in connection with the tax liability *of the widow.* We are here discussing the tax liability *of the fiduciary.* It does not follow that what is capital to the widow is capital to the trust, any more than it follows that what is income to the trust is income to the widow.

The proponents of the return of "capital" theory cannot deny the obvious fact that what the trustee collects is income. The theory, however, does assert that the same amounts, when they reach the widow, are as to her returns of capital. The theory, therefore, implicitly recognizes a mutation from income to capital. The question is: when does the mutation take place?

The change could not take place while the trustee was handling the money. The only payments that the will authorized the trustee to make to the widow were payments of income. If there was not net income, the widow got nothing under the decedent's will in this case. The trustee had no right or authority under the will to pay any capital to the widow. Therefore, from the standpoint of the trustee, what it paid to the widow was income of the estate or trust. The court below brought this out clearly where Judge Woolley said in his opinion in the *Butterworth* case (63 F. (2d) 946):

> "* * * Indubitably, the thing the trustees here received from the estate was income. With

equal certainty the thing they distributed to the widow was the same income they had received. They were without power to distribute anything else. No alteration in her status from a named beneficiary to a purchaser can change that fact. Income remains income regardless of a question whether it is taxable in a particular case. Moreover, what the widow elected to take under the will was income. That was the only thing the settlor provided for her. Failing income earned, she would take nothing. The government does not go so far as to contend that, income failing, the trustees could return her capital by extracting it from the principal of the trust."

It is obvious that the statute looks at the matter from the point of orientation of the trustee because the deduction allowed is described as "the amount of the *income of the estate or trust* for its taxable year which is to be distributed currently by the fiduciary to the beneficiary." (Italics are ours.)

However, let us follow for a moment the contention of the Government and see where it leads us. Petitioner indicates that since under the return of "capital" theory the payments received by the widow are capital to her, it must follow that they are not distributions of income from a trustee to a beneficiary. Let us explore the implications of that position. If the trustee pays capital to the widow, then the current income received by the trustee from the property in its charge must go to recoup the remaindermen for the capital that is paid out to the widow. What the

trustee eventually turns over to the remaindermen then is the balance of capital left after the payments to the widow, plus the accumulated income of the trust. They would, however, get the accumulated income less the amount of tax thereon that the trustee is to pay, and thus in effect the remaindermen would be charged with a tax on income which they received in the realm of fiction and which conferred no economic benefits upon them. They would feel the burden of a tax so arbitrary in amount and so unrelated to any economic benefit that it is unthinkable.

Moreover, if a remainderman happened to be a charity—and in the present case charities took a vested one-third interest in remainder upon the death of the granddaughter, August 26, 1924 (R. 12-13)—the deduction of a tax from the interest of a remainderman would directly contravene the further section of the statute which provides that income accumulated for charities in remainder shall be allowed to the trustee as a deduction (section 219 (b) (1)).

Let us pursue our speculation as to how a disallowance of the deduction and a consequent imposition of additional tax on the trustee would work out. We have just seen that the ultimate charging of the tax against the remaindermen creates difficulties which are insuperable. It surely is not intended that the fiduciary should bear the burden of the tax. The only alternative then is that whatever tax the fiduciary has to pay should be charged against the current payments to the widow. That, however, produces the

absurdity of charging the widow with an income tax from which, under the return of "capital" theory, she is exempt. The Government's argument requires that the tax be paid by the fiduciary on the theory that what the widow gets and what the trustee pays is capital and that payments of capital are not deductible under the statute; and yet it inevitably follows that the trustee must deduct from the payments to the widow the amount of the income tax which, by hypothesis, cannot be levied upon the "capital" payments which are made. It is a curious and incongruous result.

The respondent urges two possible avenues of escape from the dilemma. One is the avenue of escape which the Government likewise urges, namely, a total disregard of the return of "capital" theory. That we have discussed in the first point of our argument where we indicated our agreement with the Government that the sound theory applicable both to this case and to the question of taxation of the widow was the theory set forth in the *Kight* case.

The other avenue of escape from the dilemma is one that the Government rejects because it would produce no tax for it. However, it is the course which the court below adopted, and which we contend is sound. That court limited the return of "capital" theory to the situation existing when the widow was the taxpayer. It refused, however, to extend the theory in violation of the express terms of the decedent's will and in the face of a wholly incongruous result, as indicated above.

As the fiduciary looks at the situation from its point of view, it is making payments to the widow of income and the widow is a beneficiary of the trust. The fact that the transaction looked at from the standpoint of the widow makes her a purchaser, does not prevent her from being a beneficiary of the trust from the standpoint of the trustee. This, too, Judge Woolley made clear in his opinion in the *Butterworth* case (63 F. (2d) 947):

> "Construed literally and as not affected by the cited decisions of the Circuit Courts of Appeals, the provisions of the acts which allow a fiduciary a deduction for 'income' 'distributed * * * to beneficiaries,' there remains the question whether the widow (a purchaser under the cases) is a beneficiary under the will. Unless the word 'purchaser' has a legal meaning that excludes all other possible relations to the trust, we can conceive that, though acquiring her interest by purchase, she holds as a beneficiary. There is, undoubtedly, a trust. The trust provides benefits for several persons, among them the widow, should she choose to accept them. She chose. The method of her choosing (by purchase, we shall say) did not alter the status she attained by the choice. She receives benefits from the trust and, receiving benefits, she is a beneficiary and is none the less so because she may have given a valuable consideration in acquiring that status."

Following the cited portion of the opinion, Judge Woolley went on to quote the definition by the

Treasury Department of the word "beneficiary" in a closely related section of the statute where beneficiary was defined as "any person entitled to an interest in the income or the principal of a trust."

It is abundantly obvious that the plain everyday meaning of the statute would include the widow as one to whom benefits were paid by the trustee and that the payments to her were deductible as income of the estate or trust distributed by the fiduciary to a beneficiary.

The court below held that the return of "capital" theory might well be recognized and allowed with respect to the tax liability of the widow; but that, nevertheless, the fiduciary was entitled to the deductions which the respondent contends for in this case. Its reasoning is sound.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed, whether this Court rejects the return of "capital" theory or whether it restricts it to determining the tax liability of the widow.

Respectfully submitted,

ULRIC J. MENGERT,
ROBERT T. MCCRACKEN,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 77

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

FRANK PARDEE, ARIO PARDEE, AND GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF CALVIN PARDEE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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United States Board of Tax Appeals.

DOCKET NO. 44362.

FRANK PARDEE, ARIO PARDEE & GIRARD TRUST CO., TRUSTEES UNDER THE WILL OF CALVIN PARDEE,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appearances:
For Petitioners: Chas. Myers, Esq.;
For Respondent: M. E. McDowell, Esq.

DOCKET ENTRIES.

May 11, 1929.	Petition received and filed. Taxpayer notified. (Fee paid.)
May 13, 1929.	Copy of petition served on General Counsel.
July 5, 1929.	Answer filed by General Counsel.
July 9, 1929.	Copy served on taxpayer—assigned to General Calendar.
Aug. 26, 1930.	Hearing set Nov. 11, 1930.
Sept. 11, 1930.	Motion for leave to amend petition filed by taxpayer—amendment tendered.
Sept. 12, 1930.	Motion granted.
Sept. 17, 1930.	Copy of motion and amended petition served on General Counsel.

Oct. 4, 1930.	Motion to place on Reserve Calendar filed by General Counsel. 10/9/30 denied.
Nov. 11, 1930.	Hearing had before C. R. Arundell, Division 7, on merits. Case held open to Dec. 11 for filing of stipulation of deficiency. Briefs due—Petitioner's Dec. 12, 1930; respondent's Jan. 12, 1930; Jan. 25 for reply.
Dec. 1, 1930.	Transcript of hearing of Nov. 11, 1930 filed.
Dec. 9, 1930.	Motion for 30 days extension to file stipulation of deficiency filed by taxpayer—granted.
Dec. 12, 1930.	Brief filed by taxpayer.
Jan. 3, 1931.	Stipulation as to deficiency filed.
Jan. 9, 1931.	Brief filed by General Counsel.
Jan. 22, 1931.	Reply brief filed by taxpayer—copy served.
Jan. 24, 1931.	Motion for leave to file brief as *amicus curiæ* filed by taxpayer. Brief on behalf of *amicus curiæ* tendered.
Jan. 26, 1931.	Order granting motion of 1/24/31 that brief tendered be received & filed, and that copy of brief be served on respondent who shall have ten days from this date (Jan. 26, 1931) to file reply brief entered.
June 23, 1931.	Findings of fact and opinion rendered —C. Rogers Arundell, Div. 7. Decision will be entered redetermining the deficiencies in the amounts stipulated.

June 29, 1931. Decision entered C. R. Arundell, Division 7.

Dec. 21, 1931. Petition for review by U. S. Circuit Court of Appeals (3) with assignments of error filed by taxpayer.

Dec. 21, 1931. Proof of service filed.

Feb. 8, 1932. Motion for 30 day extension to prepare and transmit record filed by taxpayer.

Feb. 9, 1932. Order enlarging time to Mar. 19, 1932 for preparation of evidence and delivery of record *sur* petition for review entered.

Mar. 1, 1932. Stipulation that the copy of the will attached to the Petition for redetermination is a copy of the will referred to in the Board's findings of fact filed.

Mar. 1, 1932. Præcipe filed.

Mar. 9, 1932. Proof of service filed.

Mar. 17, 1932. Order enlarging time to 4/15/32 for transmission and delivery of record entered.

PETITION.

(Filed May 11, 1929.)

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 44362.

Frank Pardee, Acio Pardee and Girard Trust Company, Trustees Under the Will of Calvin Pardee, Deceased,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:FIII 601, dated March 15, 1929, and as a basis of their proceeding allege as follows:

(a) Your petitioners are the trustees under the will of Calvin Pardee, deceased, who died March 18, 1923, a resident of White Marsh, Montgomery County, Pennsylvania, leaving a last will duly probated before the Register of Wills of said county, by the terms of which he appointed petitioners as trustees. Petitioners have received notice from the respondent that the determination of petitioners' tax liability under the Revenue Act of 1926 for the years 1924 and 1925 discloses a deficiency of $12,020, and this proceeding is brought to determine the petitioners' liability for said deficiency.

(b) The amount of the deficiency, the nature of the tax, and the years for which asserted, are set forth in

the notice received by the petitioners from the respondent, a copy of which marked Exhibit "A" is hereto attached and hereby made a part hereof.

(c) Your petitioners allege that the respondent erred in determining that petitioners are subject to a further tax liability of $12,020, for the years 1924 and 1925.

(d) Under the will of the said Calvin Pardee, deceased, a copy of which marked Exhibit "B" is hereto attached and hereby made a part hereof, he gave to his widow, Mary C. Pardee, his personal belongings at his residence, 239 West Walnut Lane, Germantown, Philadelphia, Pennsylvania, and at Churchill Farm, Whitemarsh County, Pennsylvania, the use of said residence for life and an annuity of $50,000 per annum. Said widow elected to take under said will, by writing signed and acknowledged by her delivered to the executors of the decedent, and filed and recorded as required by Section 23 of the Act of Assembly of Pennsylvania of June 7, 1917, P. L. 403.

(e) Your petitioners aver that under the Act of Assembly above referred to and Section 3 of the Act of Assembly of said State, approved June 7, 1917, P. L. 429, the provision made for decedent's widow in his will, which she elected to take, was in lieu and full satisfaction of her dower interest at common law in his estate, and is not subject to the payment of Federal income tax by the widow or by the petitioners as trustees for her. Your petitioners are further advised and therefore aver that the amount paid to said widow during the years 1924 and 1925 by the petitioners, in compliance with the terms of the decedent's will, are wholly exempt from Federal income tax.

(f) Your petitioners aver that as trustees under the will of said Calvin Pardee, deceased, they have filed income tax returns as required by law for the years 1924 and 1925, and have paid the full amount of income tax due from them under the law for said years.

(g) Wherefore, your petitioners pray that this Board may hear the proceeding and determine that the additional tax liability assessed against the petitioners for the years 1924 and 1925 under the Revenue Act of 1926, as aforesaid, was erroneously assessed.

And your petitioners will ever pray, etc.

BARNES, BIDDLE & MYERS,
By CHARLES MYERS,
Counsel for Petitioners,
1421 Chestnut Street,
Philadelphia, Pa.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

J. H. Lawson, being duly sworn according to law, deposes and says that he is trust officer of Girard Trust Company, one of the trustees under the will of Calvin Pardee, deceased, one of the above-named petitioners; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated herein are true, except as to those facts stated on information and belief, and those facts he believes to be true.

J. H. LAWSON.

Sworn to and subscribed before me this ninth day of May, A. D. 1929.

DANIEL L. CULLEN,
Notary Public.
(Seal)
Commission expires March 2, 1933.

"EXHIBIT A."

TREASURY DEPARTMENT

Washington

March 15, 1929

IT:FIH-60D

Est. Calvin Pardee
c/o Girard Trust Co.
Phila., Pa.

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1924 & 1925 discloses a deficiency of $12,020.00, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; Whereas if No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,

D. H. Blair,
Commissioner,
By J. S. MacLaughlin
Collector of Internal Revenue.

STATEMENT

IT:FHH-60D

March 15, 1929

In re: Est. Calvin Pardee
c/o Girard Trust Co.
Phila., Pa.

Year	*Corrected Tax Liability*	*Tax Previously Assessed*	*Deficiency*
1924			$6540.00
1925			5480.00
Total			$12020.00

In accordance with the decision in the case of Warner v. Walsh (15 Fed. 2d) 367, the amounts paid a widow who elects to accept a testamentary provision for the payment to her of a certain sum annually of trust income in lieu of dower, should be regarded as capital expenditures applied in purchase of her dower right and not as distributions of income to a beneficiary. In other words the particular estate or trust should be held subject to the tax accruing upon the amounts of income turned over to the widow.

Therefore, the amounts paid annually to Mrs. Mary C. Pardee by the Estate of Calvin Pardee as shown by the returns Form 1041 filed by you as trustee for 1924 and 1925 are taxable to the Estate.

"EXHIBIT B."

I, CALVIN PARDEE, of Whitemarsh, Montgomery County, Pennsylvania, do make this my last Will and Testament, hereby revoking all other Wills at any time heretofore made by me.

FIRST. I give unto my beloved wife, Mary C. Pardee, all my household furniture, paintings, silver plate, automobiles and personal articles which may be found at my residence and garage at 239 West Walnut Lane, Germantown, and also all the personal property of every kind belonging to me at Churchill Farm, Whitemarsh, Pennsylvania, and I direct my Executors to deliver the same to my wife without making any inventory thereof.

SECOND. I direct that my beloved wife shall have the sole use of the residence at 239 West Walnut Lane, Germantown, during her life, free of all charges and I direct that all taxes, repairs and insurance shall be paid by my Executors and Trustees hereinafter named, out of my residuary estate, and I further direct my Executors and Trustees to employ a watchman who shall sleep on the premises when they are unoccupied and who shall be employed during the day in the care of the property.

THIRD. I also give unto my said wife an annuity of Fifty thousand Dollars ($50,000.), to be computed from the date of my decease and to be paid in advance in quarterly payments.

FOURTH. I give, devise and bequeath unto my son Alfred Day Pardee, in fulfillment of a verbal promise which I have made to him, two hundred and fifty (250) shares of the capital stock of the Blackwood Coal and Coke Company, unless I shall have performed said promise in my lifetime.

Fifth. I direct that my daughter, Helen Pardee Foulke, shall be allowed to occupy, free of rent, the Mather Mill House and property purchased by me from Frank Godey, and also the Old Mather or Witte Mill building on the Wissahickon, at Whitemarsh, or either of said premises, as long as she desires to do so, and that during her occupancy the taxes and other charges which may be assessed against said property, together with the cost of all reasonable repairs necessary or desirable to keep the properties in good condition, shall be paid by my estate.

Sixth. I give, devise and bequeath to Lafayette College the sum of Fifty thousand Dollars ($50,000.) free and clear of all inheritance and succession taxes, In Trust to invest the same and keep the same invested in good and safe securities and to collect the income thereof and apply the same toward the maintenance of Pardee Hall now belonging to said College.

Seventh. I give, devise and bequeath to Princeton University the sum of Fifty thousand Dollars ($50,000.), free and clear of all inheritance and succession taxes, In Trust, to invest the same and keep the same invested and to collect the income thereof and to apply such income for the maintenance of the University in such way as from time to time shall seem best to the Board of Trustees thereof.

Eighth. I give to the Rensselaer Polytechnic Institute of Troy, New York, in addition to the amount heretofore contributed by me to that institution, the sum of Forty thousand Dollars ($40,000.), free and clear of all inheritance and succession taxes, to be used by said Institute in the erection of a dormitory in memory of my brother Ario Pardee, Jr., of the Class of 1858, and of myself as a member of the Class of 1860.

NINTH. All the rest, residue and remainder of my property, real and personal, including that which may be hereafter acquired and inherited, I give, devise and bequeath absolutely and in fee simple unto the Girard Trust Company and its successors, to my brother Frank Pardee and to my son Ario Pardee and the survivors or survivor of them; IN TRUST NEVERTHELESS, to collect the rents, income, profits and dividends thereof and, after payment of the expenses of the trust, to pay to my said wife the annuity of Fifty thousand Dollars ($50,000.) which I have hereinbefore given to her.

IN TRUST, subject to the aforesaid payment to my said wife in full, to divide the rest, residue and remainder of said net income, quarterly, into eight equal parts.

One equal part I direct shall be paid to my son Ario Pardee;

One equal part I direct shall be paid to my daughter Estelle Pardee Erdman;

One equal part I direct shall be paid to my daughter Helen Pardee Foulke;

One equal part I direct shall be paid to my son Alfred Day Pardee;

One equal part I direct shall be paid to my son Howard Pardee;

One equal part I direct shall be paid to my daughter Olive Pardee;

One equal part I direct shall be paid in equal shares to my grandchildren Lucia A. Warden and Herbert W. Warden, Jr., children of my daughter Alice Pardee Warden, now deceased; and

One equal part I direct shall in the absolute discretion of my Trustees, be paid to my grandson Calvin Pardee, 3rd, son of my son Calvin Pardee, Jr., now deceased, quarterly as it accrues, or expended for his support and maintenance as his needs may require.

If any one of the nine beneficiaries aforesaid shall die during the lifetime of my wife, leaving issue, I direct that the share of income which would have been payable to such beneficiary if living shall be paid to such issue.

In the event that either my granddaughter Lucia A. Warden or my grandson Herbert W. Warden, Jr. shall die leaving no issue, I direct that the share of the grandchild thus dying shall be paid to the other of said grandchildren. Upon the death of both of my said grandchildren leaving no issue and upon the death of any one of the other seven beneficiaries leaving no issue, I direct that the share of income which would have been payable to such beneficiary if living, shall be divided among the remainder of said beneficiaries in the proportion in which they are then receiving income under the foregoing provisions of my Will.

In Trust, upon the death of my said wife to set aside and hold in trust so much of the principal of my estate as shall in the opinion of my Trustees be sufficient to provide an income of at least Twenty thousand Dollars ($20,000.) per annum and to hold the same In Trust until all my grandchildren living at the time of my death shall have attained the age of thirty (30) years; for the following uses and purposes:—

In Trust, to divide the net income thereof quarterly into as many parts or shares as there shall be grandchildren of mine living at the time of each quarterly distribution and grandchildren of mine then dead, represented by descendants then living; to pay over to each grandchild then living one of said parts or shares; to subdivide one of said parts or shares to and among the issue of any grandchild of mine then dead, per stirpes, upon the principle of representation; and to pay over to each of such issue who shall at each of

such times be found to be entitled, his or her share, as so ascertained, in fee.

In Trust, when all of my grandchildren living at the time of my death shall have attained the age of thirty (30) years, to divide the principal of said fund to and among all my grandchildren then living and the descendants of any grandchild of mine then dead in the same proportions as hereinbefore provided with respect to the income of said fund.

In Trust, upon the death of my wife and after setting aside the fund aforesaid for the benefit of my grandchildren, to divide the residue and remainder of the principal of said trust fund into eight equal parts.

One equal part I give, devise and bequeath to my daughter Estelle Pardee Erdman absolutely.

One equal part I give, devise and bequeath to my daughter Helen Pardee Foulke, absolutely.

One equal part I direct shall be subdivided into two equal shares and I give one of said shares to my granddaughter Lucia A. Warden and the other of said shares I give to my grandson Herbert W. Warden, Jr. If either of my said two grandchildren shall then be deceased, leaving issue, the share hereby given such grandchild shall be subdivided in equal parts among said issue. If either of my said grandchildren shall then be dead, leaving no issue, such grandchild's share shall be added to and become part of the share of the other of said grandchildren or of his or her issue, as the case may be. If both of my said grandchildren shall then be dead, leaving no issue, the share hereby given to them shall be divided among the shares of the other persons then entitled to a share under the provisions of this clause of my Will, in the same proportions in which the principal of my estate is hereby divided; and the amount thus ascertained shall be added to the principal of each share and treated as a part thereof.

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income, quarterly, to my son Arlo Pardee for and during the period of his natural life.

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income, quarterly, to my son Alfred Day Pardee for and during the term of his natural life.

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income quarterly to my son Howard Pardee for and during the term of his natural life.

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income quarterly to my daughter Olive Pardee for and during the term of her natural life; and

One equal part I direct shall be held by my Trustees In Trust to collect the income thereof and to pay the net income quarterly to my grandson Calvin Pardee, 3rd for and during the period of his natural life.

Upon the death of any of my said children Arlo Pardee, Alfred Day Pardee, Howard Pardee and Olive Pardee or of my said grandchild Calvin Pardee, 3rd, the principal of the share of which such descendant shall have been receiving the income shall be distributed, per stirpes upon the principle of representation, to such issue as such descendant shall leave surviving him or her. If such descendant shall leave no issue him or her surviving, such share of the principal of my estate shall be divided into as many parts or shares as there shall be children of mine then living and children of mine then dead represented by descendants then living, and such parts or shares shall be added to the shares of which such descendants of mine shall then be entitled, under the provisions of this my Will, to receive

either principal or income as the case may be; and shall be treated as part of such shares.

TENTH. My Executors and Trustees shall have during the activity of any trusts hereby created, not in substitution for the ordinary powers of testamentary trustees under the laws of Pennsylvania, but in addition thereto, the following special powers:

1. To retain any securities which they may receive for the purposes of the trusts hereby declared, and from time to time to alter such investments and to make new investments in such real or personal property as Trustees deem reasonably safe investments for trust funds, without being confined to what are technically known as "legal investments".

2. To sell any or all real or personal estate held by them for the purposes of the trust, at public or private sale, and to make good deeds or other instruments of conveyance thereof in fee simple or for any less estate, without any obligation on the part of the purchaser or purchasers to see to, or be responsible for the application of the purchase money.

3. To lease, mortgage, repair, alter or improve any property held by them under the terms of the trust.

4. To buy any mortgaged premises at any judicial sale.

5. To purchase investments at a premium and to charge the premium either to principal or income, or partly to principal and partly to income, as they shall deem best.

6. To exercise any option to subscribe for new stocks or bonds or certificates, which may be given to

them as the holders of any stocks or bonds or certificates belonging to the trust estate.

7. To join in any plan of lease, merger or consolidation, exchange, reorganization, or foreclosure of any corporation in which Trustees shall hold stocks, bonds or other securities, and to deposit such stocks, bonds or other securities thereunder and to accept new securities under such plan.

Eleventh. In case any beneficiary of income shall be unable, through sickness or otherwise, to receive and receipt for the income to which he or she is entitled at the time of any distribution Trustees shall apply such income to the benefit of such beneficiary in such way as in the Trustees' uncontrolled discretion shall seem best.

Twelfth. All distributions of income and principal herein provided for shall be so made that the same shall not be capable of anticipation, nor subject to execution nor attachment, nor be in any other way subject to the debts, contracts or engagements of such beneficiaries.

Thirteenth. All stock dividends or proceeds of sale of rights to subscribe for stock upon any stock which may from time to time be held by my Executors and Trustees, shall be treated as principal and not as income.

Fourteenth. I direct my Executors and Trustees to charge no interest on any moneys which may be due my estate by any of my children and to give my children ample time to repay any such loans. I further direct my Executors and Trustees to act in harmony with my brothers and sisters in the disposal of any real estate inherited from my Father and in which I may still own an undivided interest.

LASTLY. I appoint the Girard Trust Company of Philadelphia, my brother Frank Pardee and my son Arlo Pardee to be the Executors and Trustees of this my last Will and Testament and direct that they shall not be required to give any security for the faithful performance of their duties as such.

I request them, unless required by law so to do, not to file in any public office any inventory of my property and estate; but to cause a proper inventory to be made under the direction of my Executors, and to preserve the same among the books and papers of my Estate, so that any and all persons having an interest under my Will may have access thereto at any time.

IN WITNESS WHEREOF I have hereunto set my hand and seal this third day of November A. D. One thousand nine hundred and twenty (1920).

CALVIN PARDEE (SEAL)

SIGNED, SEALED, PUBLISHED and DECLARED by the above named CALVIN PARDEE as and for his last Will and Testament in the presence of us, who, in his presence, at his request, and in the presence of each other, have hereunto set our hands as attesting witnesses.

CARLYLE H. ROSS
421 W. Johnson St. Gtn. Phila.
JAMES WILSON BAYARD
105 East Johnson St. Germantown, Phila.

This is a true and correct copy.

GIRARD TRUST COMPANY

J. H. HOULIT,
Asst. Trust Officer.

ANSWER.

(Filed July 5, 1929.)

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(a) and (b). Admits the allegations contained in paragraphs (a) and (b).

(c). Denies that he erred in determining the tax set forth in said notice of deficiency and further denies that he erred as alleged in paragraph (c) of the petition.

(d) and (e). Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs (d) and (e) of the petition, and therefore denies the same.

(f). Denies the allegations contained in paragraph (f).

(g). Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:

L. A. LUCE,
Special Attorney, Bureau of Internal Revenue.

MOTION BY PETITIONERS TO AMEND PETITION.

(Filed September 11, 1930.)

Come now the petitioners, by their attorneys, and move the Board for leave to amend their petition by filing and attaching thereto the affidavits of Frank Pardee and Ario Pardee hereto attached.

BARNES, BIDDLE & MYERS,
By CHARLES MYERS,
Attorneys for Petitioners.

Granted September 12, 1930.

(Sgd.) JOHN M. STERNHAGEN,
Member, United States Board of Tax Appeals.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

FRANK PARDEE, being duly sworn according to law, deposes and says that he is one of the trustees under the will of Calvin Pardee, deceased, and one of the petitioners named in the petition filed in this proceeding; that he has read said petition and is familiar with the statements therein contained, and the facts stated therein are true and correct; that the above-mentioned petition shall have the same force and effect as though deponent had joined therein and added to said petition an affidavit similar to the one made by his co-trustee; and that the petition filed by deponent's co-trustee, Girard Trust Company, was filed with the consent of this deponent.

FRANK PARDEE.

Sworn to and subscribed before me this ninth day of September, 1930.

DANIEL L. CULLEN,
(Seal) *Notary Public.*
My commission expires March 2, 1933.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.:*

ANIO PARDEE, being duly sworn according to law, deposes and says that he is one of the trustees under the will of Calvin Pardee, deceased, and one of the petitioners named in the petition filed in this proceeding; that he has read said petition and is familiar with the statements therein contained, and the facts stated therein are true and correct; that the above mentioned petition shall have the same force and effect as though deponent had joined therein and added to said petition an affidavit similar to the one made by his co-trustee; and that the petition filed by deponent's co-trustee, Girard Trust Company, was filed with the consent of this deponent.

ANIO PARDEE.

Sworn to and subscribed before me this fourth day of September, 1930.

CALVIN B. WOOD,
(Seal) *Notary Public.*
My commission expires March 6, 1931.

STIPULATION.

(Filed January 3, 1931.)

It is hereby stipulated and agreed by and between the parties to the above entitled proceeding, through their respective counsel of record, that if the respondent's determination in regard to the issue raised in the petition herein is sustained, that there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $1532.94 and $3017.64 against these petitioners as trustees under the will of Calvin Pardee, deceased.

(Sgd.) CHARLES MYERS,
Counsel for Petitioners.

(Sgd.) C. M. CHAMBER,
General Counsel, Bureau of Internal Revenue.

FINDINGS OF FACT AND OPINION.

(Promulgated June 23, 1931.)

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 44362.

Frank Pardee, Ario Pardee and Girard Trust Company, Trustees Under the Will of Calvin Pardee, Deceased,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

Payments made by trustee to decedent's widow, she having elected to take under the will in lieu of dower, are not deductible in computing trust income. *Julia Butterworth, et al.*, 23 B. T. A. , followed.

Charles Myers, Esq., for the petitioners.

M. E. McDowell, Esq., for the respondent.

The respondent in this case asserted deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $6,540 and $5,480. The parties have stipulated that in the event the case is decided in favor of the respondent the correct deficiencies are $1,532.94 and $3,617.64.

FINDINGS OF FACT.

The petitioners herein are executors and trustees of the Estate of Calvin Pardee, who died testate on March 18, 1923, while a resident of Pennsylvania. The will, dated November 3, 1920, and duly admitted to probate, after making provisions for the disposal of

certain personal belongings and a life estate for his wife in the deceased's residence, provided in part as follows:

> "Third: I also give unto my said wife an annuity of . . . $50,000. to be computed from the date of my decease and to be paid in advance in quarterly payments."
>
> . . . . . .
>
> "Ninth: All the rest, residue and remainder of my property, real and personal, ... I give, devise and bequeath absolutely and in fee simple unto the Girard Trust Company and its successors, to my brother . . . and son . . . , IN TRUST NEVERTHELESS, to collect the rents, income, profits and dividends thereof, and after payment of the expenses of the trust, to my said wife the annuity of . . . $50,000. which I have hereinbefore given to her."

Provision was made for the disposition of the corpus following the death of the deceased's widow. By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Marey C. Pardee, the widow elected to take under the will in lieu of the interest she would have been entitled to in the decedent's estate had he died intestate. During 1924 and 1925 the trustees made payments to the widow as provided for under the will, which amounts, added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

In filing returns for the years 1924 and 1925 the petitioners as trustees, when computing taxable net income, deducted from gross income the amounts distributed to the widow in the same manner as they deducted amounts similarly distributed to other beneficiaries under the testamentary trust.

OPINION.

ARUNDELL:

This case is ruled by that of *Julia Butterworth et al.*, 23 B. T. A. —, decided this day and we accordingly hold that the trustees are not entitled to deduct the payments made to the widow in the taxable years.

The only distinction between the *Butterworth* case and this one is that in that case the payments to the widow were limited to the income from the trust property, whereas here the widow is given the annual sum of $50,000, which though payable primarily out of income, was payable at all events and if the income proved insufficient the trustees might invade the corpus of the trust to make up the deficiency. See *Sybil Whitehouse*, 7 B. T. A. 600; affirmed, 38 Fed. (2d) 162; and 282 U. S. —. This distinction, if it makes any difference, presents a stronger case for the respondent than the *Butterworth* case in view of the holding in the *Whitehouse* case that annuities are not income and the recipient of an annuity does not receive a distributive share of the trust income.

Reviewed by the Board.

Decision will be entered redetermining the deficiencies in the amounts stipulated.

DECISION.

(Filed June 29, 1931.)

Pursuant to the Board's findings of fact and opinion, promulgated June 23, 1931, it is

ORDERED and DECIDED: That there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $1,532.94 and $3,617.64.

(Sgd.) C. ROGERS ARUNDELL,
Member, United States Board of Tax Appeals.

PETITION OF FRANK PARDEE, ARIO PARDEE AND GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF CALVIN PARDEE, DECEASED, FOR REVIEW BY THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT OF A DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

(Filed December 21, 1931.)

The above named petitioners, by Charles Myers, their attorney, hereby petition for review by the United States Circuit Court of Appeals for the Third Circuit of the decision of the United States Board of Tax Appeals in the case of Frank Pardee, Ario Pardee and Girard Trust Company, trustees under the will of Calvin Pardee, Deceased, Petitioners v. Commissioner of Internal Revenue, Respondent, Docket No. 44,362, entered June 29, 1931, finding deficiencies in petitioners' income taxes for the calendar years 1924 and 1925 in the respective amounts of $1,532.94 and $3,617.64, and respectfully show:

1. Nature of the Controversy.

The petitioners are executors and trustees under the Will of Calvin Pardee, who died testate on March 18, 1923, while a resident of Whitemarsh, Montgomery County, Pennsylvania, leaving a last will duly probated before the Register of Wills of said county, by the terms of which he appointed petitioners as trustees. The will, dated November 3, 1920, after making provisions for the disposal of certain personal belongings and a life estate for his wife in the deceased's residence, provided in part as follows:

"Third: I also give unto my said wife an annuity of . . . $50,000. to be computed from the

date of my decease and to be paid in advance in quarterly payments.

"Ninth: All the rest, residue and remainder of my property, real and personal, . . . I give, devise and bequeath absolutely and in fee simple unto the Girard Trust Company and its successors, to my brother . . . and son . . . IN TRUST NEVERTHELESS, to collect the rents, income, profits and dividends thereof, and after payment of the expenses of the trust, to my said wife the annuity of . . . $50,000, which I have hereinbefore given to her.

"IN TRUST, subject to the aforesaid payment to my said wife in full to divide the rest, residue and remainder of said net income, quarterly, into eight equal parts."

Testator directed that the eight equal parts of the income from the residue of his estate should be paid to his children and grandchildren named therein, and made provision for the disposition of the corpus following the death of his widow, children and grandchildren. By writing, signed, acknowledged, delivered to the executors of the decedent, and duly filed and recorded as required by the statutes of Pennsylvania, Mary C. Pardee, the widow, elected to take under the will in lieu of the interest she would have been entitled to in the decedent's estate had he died intestate.

During 1924 and 1925, the trustees made payments to the widow as provided for under the will, which amounts, added to payments of prior years, did not aggregate a sum equal to that which would have been apportionable to her as of the date of deceased's death under the Pennsylvania statutory provisions had she not elected to take under the will.

In filing returns for the years 1924 and 1925 the petitioners as trustees, when computing taxable net income, deducted from gross income the amounts dis-

tributed to the widow in the same manner as they deducted amounts similarly distributed to other beneficiaries under the testamentary trust.

On March 15, 1929, the Commissioner of Internal Revenue, by J. S. MacLaughlin, Collector, mailed to your petitioners a deficiency letter stating therein that the determination of petitioners' tax liability for the years 1924 and 1925 disclosed a deficiency of $12,020 in income taxes for said years.

Within sixty days from the date of said deficiency letter, to wit, on May 11, 1929, your petitioners filed their petition with the United States Board of Tax Appeals, appealing from the aforesaid determination of the Commissioner of Internal Revenue.

After hearing before the United States Board of Tax Appeals on November 11, 1930, the said Board on June 29, 1931, promulgated its findings of fact and opinion, in which it held that under Section 249 of the Revenue Act of 1924, the petitioners, in computing the net income of the decedent's estate subject to income tax for the calendar years 1924 and 1925, were not entitled to deduct the amounts distributed to the decedent's widow, and on June 29, 1931, the Board, pursuant to said findings of fact and opinion, ordered and decided that there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $1,532.94 and $3,617.64, the parties having stipulated that if the respondent should be sustained in his disallowance of the deductions claimed, the correct deficiencies are in the amounts stated.

II. Court in Which Review Is Sought.

Petitioners aver that their income tax returns for the calendar years 1924 and 1925 were filed in the office of the Collector of Internal Revenue for the First District of Pennsylvania, at Philadelphia, Pennsyl-

vania, which Collector's office is located within the Third Circuit, and this appeal is therefore taken to the United States Circuit Court of Appeals for the Third Circuit pursuant to Section 1002 of the Revenue Act of 1926.

III. Assignments of Error.

(1) The United States Board of Tax Appeals erred in refusing to allow as a deduction in computing the net taxable income of the trustees under the will of Calvin Pardee, deceased, for the calendar years 1924 and 1925, the amount of the income of the trust that was distributed to the decedent's widow during said years.

(2) The United States Board of Tax Appeals erred in holding that the widow of Calvin Pardee, is not a "Beneficiary" of his estate.

(3) The United States Board of Tax Appeals erred in entering final judgment for the Commissioner of Internal Revenue, as follows:

> "Pursuant to the Board's findings of fact and opinion, promulgated June 23, 1931, it is Ordered and Decided: That there are deficiencies in income tax for the calendar years 1924 and 1925 in the respective amounts of $1,532.94 and $3,617.64."

Charles Myers,
Attorney for Petitioners.
1421 Chestnut Street,
Philadelphia, Pa.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } ss.:

CHARLES MYERS, being duly sworn according to law, deposes and says that he is counsel of record in the above entitled cause; that as such counsel he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true and correct to the best of his knowledge, information and belief.

CHARLES MYERS.

Sworn to and subscribed before me this eleventh day of December, A. D. 1931.

HELEN G. GABELL,
(Seal) *Notary Public.*
My commission expires January 6, 1935.

STIPULATION.

(Filed March 1, 1932.)

It is hereby stipulated and agreed by and between the parties to the above entitled proceeding, through their respective counsel of record, that the copy of the will attached to the petition for redetermination is a copy of the will referred to in the Board's findings of fact, which was received in evidence at the hearing before the Board on November 11, 1930.

(Sgd.) CHARLES MYERS,
Counsel for Petitioners.
(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

PRÆCIPE FOR RECORD.

(Filed March 1, 1932.)

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and on or before March 19, 1932, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit, a transcript of the record in the above cause, prepared and transmitted as required by law and the rules of said Court, and to include in said transcript of record, copies of the following documents duly certified as correct:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination, including exhibits attached thereto.

(b) Answer of the respondent.

(c) Motion by petitioners to amend petition granted September 12, 1930.

(d) Stipulation setting forth the amount of deficiencies if the respondent's determination is sustained.

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review filed by the petitioners in the above cause.

(6) Stipulation that the copy of the will attached to the petition for redetermination is a copy of the will referred to in the Board's findings of fact.

(Sgd.) CHARLES MYERS,
Attorney for Petitioners.
1421 Chestnut Street,
Philadelphia, Pa.

Service of a copy of the foregoing praecipe for the record accepted this day of March, 1932.

.....
Attorney for Respondent.

CERTIFICATE.

I, B. D. Gamble, Clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 30, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this twenty-first day of March, A. D. 1932.

B. D. Gamble,
Clerk.

(Seal)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 4903. October term, 1933

FRANK PARDELL ET AL., TRUSTEES UNDER WILL CALVIN PARDEE, petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

And afterwards, to wit, the 6th day of October 1932, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Victor B. Woolley, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, circuit judges, and the court not being fully advised in the premises, takes further time for the consideration thereof,

And aftrewards, to wit, on the 4th day of March 1933, come the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals, for the Third Circuit

No. 4903. October term, 1932

FRANK PARDEE, ARIO PARDEE, AND GIRARD TRUST COMPANY, TRUSTEES Under the Will of Calvin Pardee, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for review from the United States Board of Tax Appeals

Opinion

(Filed March 4, 1933)

Before WOOLLEY, DAVIS and THOMPSON, Circuit Judges

WOOLLEY, Circuit Judge:

Calvin Pardee, a resident of Pennsylvania, died in 1923. By his will he bequeathed and devised certain property to his wife absolutely. He then gave her "an annuity of $50,000", but by a later paragraph in the will conveyed the residue of his estate to trustees in trust to collect income and pay his wife the annuity which thereinbefore he had given her. Other provisions of the will indicate the annuity was for life, with remainders over as to the corpus.

The testator's wife elected to take under the will in lieu of the interest in her husband's estate which the law of Pennsylvania gave her.

During 1924 and 1925, the tax years in question, the trustees made payments of income to the widow in amounts which, together with payments made in other years, were less than the value of her statutory interest in her husband's estate, had she elected to take against the will.

In computing taxable net income in their returns for the stated tax years, the trustees deducted the income they had distributed to the widow in paying the annuity. They did this under the literal terms of section 219 of the Revenue Acts of 1924 and 1926 (43 Stat. 269; 44 Stat. 9). The Commissioner of Internal Revenue, being influenced by the decisions in Warner v. Walsh, 15 Fed. (2d) 807; United States v. Bolster, 26 Fed. (2d) 700 and Allen v. Brandies, 29 Fed. (2d) 393, disallowed the deductions and assessed deficiency taxes against the trustees. On appeal the United States Board of Tax Appeals sustained the Commissioner on authority of its decision in Julia Butterworth, et al., Trustees, 23 B.T.A. 880. The case is in this court on the trustees' petition to review the action of the Board.

The question decided by the Board and submitted here for review—the right of a trustee under the statutes, when computing taxable income, to deduct income distributed, after election, to a widow as beneficiary—is the same question decided in different ways by the Board and by this court in Butterworth v. Commissioner, Fed. (2d) , arising, however, from a different state of facts. In the Butterworth case as in the three cited cases in the Circuit Courts of Appeals, the widow received income from the trust. In none of these cases was she entitled to principal. In none was her interest an annuity in a purely technical sense. The latter three cases held, however, that her interest in the trust was, on her election, "in fact and in legal effect the purchase of an annuity", limited, however, to income; whereas in the instant case the bequest is of a fixed annuity which, though payable primarily out of income, is seemingly payable at all events, whether from income or principal.

On this difference between the cases referred to and the present case, the Board cited and the Government relies on Commissioner v. Whitehouse, 7 B.T.A. 600, affirmed in 38 Fed. (2d) 162, and in turn affirmed in 283 U.S. 148, as making this case even stronger than Butterworth v. Commissioner. In Commissioner v. Whitehouse the court held that where an annuity is bequeathed as a definite sum payable at all events, payments "received" by the donee (not there a widow) are not part of the donee's gross income but are exempted therefrom as property acquired by gift or bequest. Thus it appears that in Commissioner v. Whitehouse and in the cases in the Circuit Courts of Appeals on which the Board founded its decision in the Butterworth case, the courts were concerned, and concerned only, with the tax liability of the recipients of trust funds. None of these cases dealt with the tax liability of trust estates with respect to income paid to a widow or annuitant. They decide simply that the widow

in the one case, and the annuitant in the other, is, for different reasons, exempted from taxes, and unless it follows that, because of such exemption, the income is taxable to the trust estate, they afford no authority for the Board's conclusion. The question with which we are concerned is not the tax liability of a widow or annuitant, but the liability of the trust estate to pay taxes from which she is exempt. The fact that the annuity was given to a widow lends nothing to the case. It makes no difference whether it is to a widow or to a daughter, as the sole question is whether an annuitant, be she widow or someone else, is a beneficiary within the terms of the statutes under review and in the sense in which the word is ordinarily used and understood. If she is a beneficiary, the trustees were allowed by the statutes to deduct distributions of income made to her. This brings us back to the reasons for our decision in Butterworth v. Commissioner which, we hold, rules the instant case and calls for a reversal of the judgment of the Board of Tax Appeals.

THOMPSON, Circuit Judge, dissenting.

A true copy: Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit

No. 4903. October term, 1932

FRANK PARDEE ET AL., TRUSTEES UNDER WILL OF CALVIN PARDEE, petitioners

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby reversed.

PHILADELPHIA, *March 4, 1933.*

VICTOR B. WOOLLEY, *Circuit Judge.*

(Endorsements:) 4903. Order reversing decree. Rec'd & filed Mar. 4, 1933. William P. Rowland, clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit. Set.

I, William P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record and

proceedings in this court in the case of Frank Pardee et al., trustees under will of Calvin Pardee, petitioners, vs. Commissioner of Internal Revenue, respondent, no. 4008, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof I have hereunto subscribed by name and affixed the seal of the said court, at Philadelphia, this 20th day of April in the year of our Lord one thousand nine hundred and thirty-three and of the independence of the United States the one hundred and fifty-seventh.

WM. P. ROWLAND,
Clerk of the U.S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. —

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FRANK PARDEE, ARIO PARDEE, AND GIRARD TRUST COMPANY, Trustees Under the Will of Calvin Pardee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of David Burnet, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in the above cause on March 4, 1933, reversing a decision of the Board of Tax Appeals (R. 36).

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23) is reported in 23 B.T.A. 846. The opinion of the Circuit Court of Appeals (R. 34) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered March 4, 1933 (R. 36). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to deduct, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the decedent's estate.

STATEMENT

The facts found by the Board of Tax Appeals (R. 23) may be summarized as follows:

Calvin Pardee died testate a resident of Pennsylvania on March 18, 1923. By his will he disposed of his personal belongings and left a life estate to his wife in his residence. He then gave his wife an annuity of $50,000 and left the rest of his estate to the respondents as trustees with direction to pay the annuity to her. Provision was made for the disposition of the surplus income and of the corpus of the estate after the widow's death.

The amounts thus paid to the widow by the respondents in 1924 and 1925, the tax years here involved, taken together with payments in previous

years, did not aggregate the value of the interest to which she would have been entitled had she taken against the will.

In computing the taxable income of the estate for the years involved the respondents deducted from gross income the amounts distributed to the widow. The Commissioner disallowed the deduction thus claimed and asserted a deficiency accordingly. This action was sustained by the Board of Tax Appeals. The court below reversed the Board, one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions were of income *qua* income and that the widow was with respect to these distributions a true beneficiary.

2. The Circuit Court of Appeals erred in holding that income, distributed by testamentary trustees to a widow who has elected to take under the will, is deductible by the trustees although it is not taxable to the widow, thus creating an exemption not contemplated by the revenue statutes.

3. The Circuit Court of Appeals erred in deciding that the amounts distributed by the respondents to the widow in pursuance of the terms of the testamentary trust were deductible by the trustees.

4. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

This case presents the same question as that involved in *Harold Harmon* v. *Julia Butterworth*, pending before this Court on petition for a writ of certiorari, No. [illegible], October Term, 1939. The reasons relied upon as justifying the issue of the writ in this case are presented in the petition in the *Butterworth* case, to which this Court is respectfully referred.

Respectfully submitted.

J. Crawford Biggs,
Solicitor General.

MAY 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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CITATIONS

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Purdon's Pennsylvania Statutes Annotated, Title 20, Decedents' and Trust Estates:

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In the Supreme Court of the United States

OCTOBER TERM, 1933.

No. 77

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FRANK PARDEE, ANNA PARDEE, AND GIRARD TRUST COMPANY, trustees under the will of Calvin Pardee

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 23) is reported in 23 B.T.A. 846. The opinion of the Circuit Court of Appeals (R. 34) is reported in 63 F. (2d) 948.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 4, 1933. (R. 36.) The petition for a writ of certiorari was filed May 17, 1933, and was granted May 29, 1933. (R. 38.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the testator's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 6-7.

STATEMENT

The facts found by the Board of Tax Appeals (R. 23) are not controverted and may be summarized as follows:

Calvin Pardee died, a resident of Pennsylvania, on March 18, 1923. By his will he disposed of his personal belongings and left a life estate to his wife in his residence. He then provided (R. 24):

> Third: I also give unto my said wife an annuity of * * * $50,000, to be computed from the date of my decease and to be paid in advance in quarterly payments.

Provision was made for the disposition of the surplus income and of the corpus of the estate after the widow's death.

The amounts thus paid to the widow by the respondents in 1924 and 1925, the tax years here involved, together with payments in previous years, did not aggregate the value of the interest to which she would have been entitled had she taken against the will.

In computing the taxable income of the estate for the years involved the respondents deducted from gross income the amounts distributed to the widow. The Commissioner disallowed the deduction thus claimed and asserted a deficiency accordingly. This action was sustained by the Board of Tax Appeals. The court below reversed the Board, one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions were of income as such and that the widow was with respect to these distributions a true beneficiary.

2. The Circuit Court of Appeals erred in holding that income, distributed by testamentary trustees to a widow who has elected to take under the will, is deductible by the trustees although it is not taxable to the widow, thus creating an exemption not contemplated by the revenue statutes.

3. The Circuit Court of Appeals erred in deciding that the amounts distributed by the respondents to the widow in pursuance of the terms of the testamentary trust were deductible by the trustees.

4. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

ARGUMENT

This case presents the question which is discussed in Point II of the Government's brief in *Commissioner* v. *Butterworth*, pending before this

Court as No. 75, October Term, 1933. The Court is respectfully referred to the argument and authorities there presented.

In the *Butterworth case* the widow was entitled to receive only the income from the trust, and it is argued in Point III of the brief that the widow should be held taxable on this income. In the present case the widow is entitled to receive an annuity, which is payable primarily out of income but apparently payable at all events whether from income or principal. If the proper construction of the will is that the annuity is payable out of principal if the income is insufficient, then it is settled by this Court's decision in *Burnet* v. *Whitehouse*, 283 U.S. 148, that the widow is not taxable on the payments. For this reason the argument advanced in Point III of the Government's brief in the *Butterworth case* may not be applicable here.

If the annuity in this case was payable at all events whether or not there should be sufficient income, then this Court's decision in the *Whitehouse case, supra*, would seem to make it plain that the amounts paid to the widow are not proper deductions under Section 219. This Court there said (p. 151):

> As held below, the bequest to Mrs. Whitehouse was not one to be paid from income but of a sum certain, payable at all events during each year so long as she should live. It would be an anomaly to tax the receipts for one year and exempt them for another simply because executors paid the first from in-

come received and the second out of the corpus. The will directed payment without reference to the existence or absence of income.

* * * * *

An attempt is made to strengthen the position of the Commissioner by reference to § 219, Act of 1921, which declares that the tax imposed by §§ 210 and 211 shall apply to the income of estates, including—"Income which is to be distributed to the beneficiaries periodically; * * *." *But clearly enough, we think, this section applies only to income paid as such to a beneficiary.* (Italics ours.)

Under this controlling construction of the statute we submit that Section 219 (b) (2) permits the deduction only of income required to be paid as such. Since the terms of the will do not so require, the claimed deductions must be denied.

CONCLUSION

The judgment of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

SEWALL KEY,
ERWIN N. GRISWOLD,
WM. CUTLER THOMPSON,
Special Assistants to the Attorney General.

OCTOBER 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct; * * *.

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the

amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year; * * *. (U.S.C., Title 26, Sec. 969.)

Section 219 (a) (2) and (b) (2) of the Revenue Act of 1926, c. 27, 44 Stat. 9 (U.S.C. App., Title 26, Sec. 969), is identical with the corresponding provisions of the Revenue Act of 1924.

Purdon's Pennsylvania Statutes Annotated, Title 20, Decedents' and Trust Estates:

Sec. 31. *Widow's share in lieu of dower.*—The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law, so far as relates to land of which the husband died seised; and her share in lands aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in lands of which the husband died seised. * * * (1917, June 7, P.L. 429, §3.)

Sec. 261. *Spouse can elect to take against will.*—When any person shall die testate, leaving a surviving spouse who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate: * * *. (1917, June 7, P.L. 403, §23 [a].)

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77. October Term, 1938.

GUY H. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

vs.

FRANK PARDEE, ARIO PARDEE, and GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF CALVIN PARDEE,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for the Respondent.

Ralph P. Byers,
1305 Land Title Bldg.,
Philadelphia, Pa.
Attorney for Respondent.

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IN THE

Supreme Court of the United States

No. 77. October Term, 1933.

GUY H. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

vs.

FRANK PARDEE, ARIO PARDEE, and GIRARD TRUST COMPANY, TRUSTEES UNDER THE WILL OF CALVIN PARDEE,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 23) is reported in 23 B. T. A. 846. The opinion of the Circuit Court of Appeals (R. 34) is reported in 63 F. (2d) 948.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 4, 1933 (R. 36). The petition for a writ of certiorari was filed May 17, 1933, and was granted May 29, 1933 (R. 38). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

ARGUMENT

Calvin Pardee, a resident of Pennsylvania, by his will gave his residuary estate in trust to pay to his widow an annuity of $50,000, and to divide the remaining income among his children and issue of deceased children, with ultimate remainders not important here.

Under the law of Pennsylvania the annuity to the widow was payable primarily out of income, but in case of a deficiency in income, the deficit was payable out of principal. (*Johnston's Estate*, 264 Pa. 71.)

Under the decision of this Court in *Burnet v. Whitehouse*, 283 U. S. 148, payments received by the widow on account of her annuity, whether out of income or principal of the estate, were not taxable to her because exempt under Section 213 (b) (3) of the 1924 Revenue Act, which provides that the term "gross income" does not include the value of property acquired by gift, bequest, devise or descent.

For the taxable years in question, 1924 and 1925, payments to the widow were in fact made out of income of the estate, and in computing the taxable income of the estate the trustee deducted the amount so distributed to the widow under the authority of Section 219 (b) (2) of the 1924 Revenue Act, which provides:

> "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not."

It will be seen, therefore, that the whole point of the case turns upon the question whether a widow who receives an annuity is a beneficiary within the meaning of the Act.

It must be assumed that when Congress used the word "beneficiary" it did so in the ordinary and commonly accepted meaning of the word. (*Old Colony R. Co. v. Commissioner of Internal Revenue*, 284 U. S. 552, at p. 560.)

In common parlance the word "beneficiary", as applied to a decedent's estate, means any one who receives a share of the estate, whether it be income or principal. It is defined by the Regulations promulgated by the Commissioner, under the 1924 Act, as follows:

> "The term 'beneficiary' as used in this article includes any person entitled to an interest in the income or the principal of a trust, but does not include one having merely a nominal interest in the income or principal. (Reg. 65, Art. 347)."

Manifestly the widow in this case is a beneficiary in the ordinary meaning of the word. The petitioner, however, contends that Congress intended the word "beneficiary" to include only those beneficiaries who are, under the Act, subject to tax upon the amounts of income so distributed. This contention is urged upon two grounds,

(1) That this Court has already so decided in *Burnet v. Whitehouse*, supra; and

(2) That under Section 219 (b) (2) the deduction allowed for amounts distributed to the beneficiaries is conditioned upon the inclusion of such amounts in computing the net income of the beneficiaries.

1. The question before this Court in *Burnet v. Whitehouse* was not whether in computing the taxable income of an estate the trustees were entitled to deduct payments of income made to an annuitant, but whether such payments were taxable to the annuitant simply because they happened to be made out of the income of the estate. This Court held that a fixed annuity was property acquired by gift, bequest, devise or descent, and therefore exempt from tax to the annuitant under provision of Section 213 (b) (3) of the Revenue Act of 1921, which is the same as the corresponding section of the 1924 Act.

Section 219 of the 1921 Act contained a provision similar to that in Section 219 of the 1924 Act, and the Commissioner in that case argued that under that section payments made on account of the annuity, insofar as they were made from the income of the estate, were taxable to the annuitant. This Court, however said, (p. 151):

> "But clearly enough, we think, this section applies only to income paid as such to a beneficiary. And, as above shown, the sums received by Mrs. Whitehouse were not gifts to be derived from and paid out of income, *nor were they received as such by her.*
>
> "The exemption in Section 213 is plain and should not be destroyed by any strained construction of general language found in Section 219."

It seems quite clear that all the Court intended to say in that case was that, regardless of the fact that payments were made out of income, they did not represent income to the annuitant.

Referring to Section 219 (b) (2) it will be observed that the deduction which is allowed to the estate is "the amount of the *income of the estate* * * * which is to be distributed currently by the fiduciary to the beneficiaries."

Clearly the right to deduct depends solely upon the fact that the payments are made out of the income of the estate, and it is immaterial that when they get into the hands of the beneficiary they may not represent income or taxable income to her.

2. This brings us to the second ground for petitioner's contention, namely, that the deduction is allowed to the trustees only on condition that the beneficiaries pay the tax.

This would be a strained construction of this section. Obviously the provision "but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries, whether distributed to them or not" is not a condition of the deduction allowed to the trustees. The sole purpose of this clause was to require the beneficiaries to include, in computing their individual net income, any income which they were entitled to receive for the taxable year, *whether in fact distributed or not.*

The petitioner says that Congress intended to tax all income accruing to property held in trust, and that if the income paid to the widow in this case is not taxable to the trustee, it will be exempt from tax altogether.

It is for Congress and not for the Courts to determine what income shall be taxed and what shall be exempt. While it is true that the exemption from tax in cases such as this may mean a substantial loss of revenue to the Government, that is a legislative, and not a judicial matter.

The intention of Congress must be derived from the language which it used. As Judge Woolley said in the opinion in the court below in No. 75, referring to this argument:

> "The infirmity in this argument is that taxation is not imposed by reasoning or by an exigency but by statute and only those named in the statute must

pay a tax. If in naming taxables it should, as here, later be found that the Congress, (for whatever reason) omitted a class available for taxation, that is a misfortune of the government which cannot be cured by a court reading into a statute something which is not there, or giving its words a meaning different from their known and ordinary signification."

The petitioner also argues that Congress did not intend to create an exemption in favor of income distributed to widows. However that may be as a general proposition, this Court has said in the *Whitehouse* case that where income is distributed to a widow on account of a fixed annuity, Congress plainly intended that such income should be exempt.

The fallacy of the petitioner's position is that it assumes that Congress intended to tax all income, whereas, obviously, such is not the case. For instance, income paid on account of charitable bequests is exempt from tax to the beneficiary, but is not on that account taxable to the trustee. (*Lederer v. Stockton*, 260 U. S. 3.) It is quite reasonable to suppose that when Congress made an exemption in favor of property acquired by gift, bequest, devise or descent it meant to grant an absolute exemption in favor of such property, regardless of the source from which payment happened to be made, and that this was the intention is confirmed by the fact that after the decision of this Court in the *Whitehouse* case, Congress, in Section 162 of the 1932 Revenue Act, re-enacted the provisions of Section 219 (b) (2) of the 1924 Act without change.

In the *Butterworth* case, (No. 75) the petitioner's principal argument is that under Section 219 (b) (2), the income is taxable to the widow. While this argument cannot prevail in this case, in view of this Court's decision in the *Whitehouse case*, it is a virtual admission that

the interpretation upon which petitioner relies in this case is untenable, since it would be absurd to say that a widow who receives an income for life is a beneficiary, but a widow who receives an annuity for life is not.

The fallacy of the petitioner's argument is further illustrated by carrying it to its logical conclusion. Assume that the net income of the Pardee estate in a given year was exactly $50,000., so that the entire income was paid to the widow. If the trustee is required to pay the tax, it has no source of payment but principal, in which case the tax would be a tax on principal, which, as petitioner points out, would be unconstitutional. Moreover, it is not by any means fanciful to imagine that such a tax, through a period of years, might so reduce the principal that the estate would be insufficient to pay the widow's annuity, so that the tax would finally fall upon her. Certainly such an iniquitous result is not to be ascribed to Congress unless the language of the taxing act admits of no possible alternative.

Respectfully submitted,

RALPH B. EVANS,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 78

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF J. H. WOODWARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Docket No. 43615.

TITLE GUARANTEE LOAN & TRUST CO., AS TRUSTEE OF THE ESTATE OF J. H. WOODWARD,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appearances.

For Petitioner: Oscar W. Underwood, Jr., Esq., H. C. Kilpatrick, Esq.

For Respondent: Prew Savoy, Esq.

DOCKET ENTRIES.

1929.

Apr. 11 Petition received and filed. Taxpayer notified. (Fee paid.)

Apr. 12 Copy of petition served on General Counsel.

May 23 Answer filed by General Counsel.

May 25 Copy of answer served on taxpayer. General Calendar.

1931.

Nov. 14 Hearing set Jan. 20, 1932.

Dec. 17 Stipulation of facts filed.

1932.

Jan. 12 Motion to consolidate with docket 51185 filed by General Counsel. 1/13/32 granted.

Jan. 20 Hearing had before Mr. Trammell, Div. 2, called on the merits. Petitioner's proposed findings of fact filed. Brief due in 2 weeks.

Feb. 12—Memorandum opinion rendered Mr. Trammell. Division 2. Judgment will be entered for the Commissioner.
Feb. 13—Decision entered—Mr. Trammell, Division 2.
Mar. 1—Petition for review to U. S. Circuit Court of Appeals (5) with assignments of error filed by taxpayer.
Mar. 1—Proof of service filed.
Mar. 10—Praecipe filed.
Mar. 10—Proof of service of praecipe filed.
Mar. 10—Stipulation to prepare a joint transcript of record filed.
Mar. 12—Transcript of hearing Jan. 20, 1932, filed.

---

2 Docket No. 51185.

Title Guarantee Loan & Trust Co., as Trustee of the Estate of J. H. Woodward, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

Appearances.

For Petitioner: Oscar W. Underwood, Jr., Esq., H. C. Kilpatrick, Esq.

For Respondent: Prew Savoy, Esq.

DOCKET ENTRIES.

1930.
Dec. 8—Petition received and filed. Taxpayer notified. (Fee paid.)
Dec. 8—Copy of petition served on General Counsel.

1931.
Jan. 26—Answer filed by General Counsel.
Jan. 28—Copy of answer served on taxpayer—General Calendar.

1932.

Jan. 12—Motion to consolidate with 43615 set 1/-20/32 filed by General Counsel. 1/13/32 granted.

Jan. 12—Stipulation of facts filed.

Jan. 20—Hearing had before Mr. Trammell, Division 2, on merits. Petitioner's proposed findings of fact filed. Briefs due in two weeks.

Feb. 12—Memorandum opinion rendered—Mr. Trammell, Division 2. Judgment will be entered for the Commissioner.

Feb. 13—Decision entered—Mr. Trammell, Division 2.

Mar. 1—Petition for review by U. S. Circuit Court of Appeals (5) with assignments of error filed by taxpayer.

Mar. 1—Proof of service filed.

Mar. 10—Praecipe filed.

Mar. 10—Proof of service filed.

Mar. 10—Stipulation to consolidate record with docket 43615 filed.

Mar. 12—Transcript of hearing Jan. 20, 1932, filed.

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3 PETITION.

Filed Apr. 11, 1929.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs. Docket No. 43615.
Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the

Commissioner of Internal Revenue in his notice of deficiency, IT:AR:B-4-JHC-60D, dated February 26, 1919, and as a basis of his proceeding alleges as follows:

(1) The petitioner is a corporation, with principal office at the Title Guarantee Building, Birmingham, Alabama, and is trustee under the will of J. H. Woodward, as hereinafter set forth.

(2) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner by registered mail on February 26, 1929, and was received by the petitioner in due course of mail.

(3) The taxes in controversy are income taxes for the calendar years 1924, 1925, 1926 and 1927, and for $44,344.11.

4 (4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in determining that any deficiency is due for any of the years 1924, 1925, 1926 and 1927.

(b) Under the applicable provisions of Section 219 of the Revenue Acts of 1924 and 1926, the respondent erred in determining that the petitioner is liable for any tax for the years 1924, 1925, 1926 and 1927.

(c) The respondent erred in not allowing, under the provisions of Section 219 (b) and Section 219 (b) (2) of the Revenue Acts of 1924 and 1926, as additional deductions in computing the net income of the estate or trust of Joseph H. Woodward for the calendar

years 1924, 1925, 1926 and 1927, respectively, the following amounts, distributed currently to Martha B. Woodward by the petitioner as fiduciary to her as beneficiary of the said estate or trust, to-wit:

1924	$119,891.11
1925	70,467.01
1926	73,403.43
1927	73,030.94

(d) The respondent erred in not allowing as additional deductions in computing the net income of the estate or trust of J. H. Woodward, pursuant to Section 219 (b) and 219 (b) (2) of the Revenue Acts of 1924 and 1926, for the calendar years 1924, 1925, 1926 and 1927, respectively, all sums distributed by the petitioner as fiduciary to Martha B. Woodward as beneficiary under the trust created by the will of J. H. Woodward, and, as a result of not allowing such additional deductions, erred in determining adjusted net incomes of the petitioner as trustee of said estate or trust for said calendar years, respectively, as follows, to-wit:

1924	$119,891.11
1925	70,467.01
1926	73,403.43
1927	78,022.94

(e) The respondent erred in not determining, under Section 219 (b) and Section 219 (b) (2) of the Revenue Acts of 1924 and 1926 that there was no taxable net income for any of the years 1924, 1925, 1926 and 1927.

(5) The facts upon which the petition relies as the basis of this proceeding are as follows:

(a) Martha B. Woodward, a citizen of the United States and a resident of Birmingham, Alabama, was

the wife of Joseph H. Woodward, a citizen of the United States and a resident of Birmingham, Alabama, who died on December 15, 1917. The said Martha B. Woodward died on May 13, 1928.

(b) Joseph H. Woodward died on December 15, 1917, seized and possessed of real and personal property having a gross value at the time of his death of $4,883,622.86, and a value as a net estate of $4,641,-577.16, according to the final determination of D. H. Blair, Commissioner of Internal Revenue, by decision dated December 14, 1922, contained in a letter dated that date addressed to Alan H. Woodward, et al., executors, estate of J. H. Woodward, under symbols "ET-102-C1.R.-LCM—District of Alabama—Estate of J. H. Woodward—date of death December 15, 1917", which decision referred to and adopted a number of determinations made in a previous letter from the said Commissioner, dated October 12, 1920. Said decision determined the following expenses of administration and taxes, and determined that the estate of Joseph H. Woodward had the following values at the time of his death:

Gross value of real estate, $385,771.49 (included in which was a value of $40,000 for his residence in Birmingham, and a value of $37,000 for his winter home in Orange County, Florida); gross value of personal property, $4,497,851.37; expenses of administration $242,045.70, and the Federal estate tax, $617,-483.89, making the aggregate expenses of administration $859,529.59. Under the law of Alabama the said expenses were primarily chargeable to the personal property, and the net personal estate was $3,638,-321.78.

(b) Above and beyond the value of the dower rights of Martha B. Woodward in the real property

owned by Joseph H. Woodward at the time of his death, which dower rights had a substantial value, the said Martha B. Woodward, under Section
7 3763 of the Code of Alabama of 1907 (now Section 7374 of the Code of Alabama of 1923), was entitled, upon the death of Joseph H. Woodward, to a child's part in the personal estate of Joseph H. Woodward. Joseph H. Woodward had three children, all of whom survived him, namely, Alan H. Woodward, Mrs. Margaret W. Hopkins and Mrs. Bertha W. Underwood. Under said section of the Code of Alabama, the decedent, Joseph H. Woodward, having had three children, Martha B. Woodward was entitled, upon his death, to a child's part of one-fourth of the value of his personal estate, and under said provision she then became entitled to, and was seized and possessed of, one-fourth of the net personal estate of the said Joseph H. Woodward, or personal property to the value of $909,580.44, wholly above and beyond her dower right in his real property, to which she was also entitled.

(c) Joseph H. Woodward died testate, and his last will and testament, with a codicil thereto, was duly probated in the Probate Court of Jefferson County, Alabama, on December 21, 1917.

(d) Under his will and codicil, Joseph H. Woodward devised to Martha B. Woodward a life estate in his residence in Birmingham and a life estate in his winter home in Orange County, Florida. She was then of an advanced age, and the cash value
8 of these life estates was, upon information and belief, not in excess of $30,000, and, upon information and belief, said sum was less than the value of her dower right, which, under the law of Alabama and the law of Florida, in which two states all of his real property was situated, is a one-third in-

terest for life in the real estate of which her deceased husband died seized and possessed.

(e) By Item 7 of the codicil to the will of Joseph H. Woodward (a true and correct copy of which is attached hereto marked Exhibit B and made a part hereof), he devised and bequeathed all of his residuary estate of every kind and character, of which he died seized and possessed, to the petitioner, Title Guarantee Loan & Trust Company, a corporation of Birmingham, Alabama, as trustee, and the said trustee was, by the terms of said Item 7, directed to pay the cost and expense incident to the preservation of the trust estate, and further to pay from the income from the trust estate $25 per month to one Marion Wallace during her life, and to pay all of the rest of the net income from the trust estate, as and when received, to certain persons, his wife, Martha B. Woodward, to receive one-fourth thereof, and the other said persons to receive the remaining three-fourths in the proportions set forth in the said Item 7. The petitioner, as trustee, has at all times strictly performed its duties as trustee.

From the time the petitioner qualified as such trustee to the date of Martha B. Woodward's death, the petitioner disbursed the said one-fourth of all of the rest of the net income from the trust estate, as and when received, to Martha B. Woodward. The remaining three-fourths of the said net income, as well as the $25 per month to Marion Wallace, has at all times been disbursed by the petitioner to those persons in full, as and when received, and, upon information and belief, such persons accounted for the same upon their individual income tax returns at all times; and the respondent does not in his said deficiency notice assert any claim against the petitioner on account of such disbursements, but has duly allowed all of such disbursements as additional deductions in computing the net income of the trust

estate, as required by Section 219 (b) (2) of the Revenue Acts of 1924 and 1926, and corresponding provisions of prior revenue laws, and the deficiency or deficiencies asserted in said deficiency notice are based wholly upon the sums to which Martha B. Woodward was entitled and which were distributed to her during the calendar years 1924, 1925, 1926 and 1927.

(f) Under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907 (now Sections 10593 and 10594 of the Code of Alabama of 1923), a widow may in all cases dissent from the will of her husband, and, in lieu of the provisions made for her by such will, take her dower in the land and such portion of the personal estate as she would be entitled to in the case of intestacy. The said provisions of law provide for the filing of a written dissent with the Judge of probate of the county in which the will is probated within twelve months from the probating of the will. Martha B. Woodward, however, did not dissent from the will and codicil of Joseph H. Woodward, but accepted the provisions made for her therein, and received to the date of her death the income allotted to her by Item 7 of the codicil. From the date of the death of Joseph H. Woodward until the date of her death, namely, May 15, 1928, she received a total of $658,802.69 as such income, which was the full amount of the income to which she was entitled under said Item 7, the petitioner having, as trustee, pursuant to the terms of such provision, disbursed all of such income and retained in the trust estate only the principal or corpus thereof. Said sum of $658,802.69 included the following sums, which were distributed to Martha B. Woodward during 1924, 1925, 1926 and 1927, and which were asserted as the net income of the petitioner, as trustee of the estate of

J. H. Woodward, and upon which the deficiencies for those years are based, as are more fully set forth in the said deficiency notice, namely:

1924	.....	$119,891.11
1925	.....	70,467.01
1926	.....	73,403.43
1927	.....	73,030.94

(g) Said Martha B. Woodward, for each of the calendar years after the death of Joseph H. Woodward, through and including the year 1927, duly filed income tax returns with the Collector of Internal Revenue at Birmingham, Alabama, and upon her said returns she reported all of the income received by her at all times under Item 7 of the said codicil from this petitioner, as trustee, (including the sums received by her during 1924, 1925, 1926 and 1927, as set forth in paragraph (f) hereof) with the exception of $33,852, which was paid to her between January 1, 1928 and April 4, 1928; that is, she reported upon her returns for years subsequent to Joseph H. Woodward's death, and through the calendar year 1927, an aggregate of $624,950.69, and upon said returns she paid the full income tax upon said $624,950.69, in the same manner as if the said $629,950.69, representing all distributions received by her through the calendar year 1927, were taxable beyond question. She did not, as already stated, pay taxes upon the $33,852 received in 1928, having died before her return was due for 1928.

(h) This petitioner, as trustee of said trust estate, duly filed with the Collector of Internal Revenue at Birmingham, Alabama, fiduciary returns of
12 income for all of the years during which this petitioner has acted as trustee under the said trust, and, in particular, with reference to the years 1924, 1925, 1926 and 1927, this petitioner filed upon

Form 1041 with the said Collector fiduciary returns of income in the name of "Estate of J. H. Wooward, Title Guarantee Loan & Trust Company, Birmingham, Alabama" for the calendar years 1924, 1925, 1926 and 1927 as follows:

On March 4, 1925, a return on said form, for the calendar year 1924, showing a net income of $479,-864.45, and the distribution of the entire amount of said net income to the said beneficiaries, including $119,891.11, to Martha B. Woodward;

On January 27, 1926, a return on said form, for the calendar year 1925, showing a net income of $282,-168.04, and the distribution of the entire amount of said net income to the said beneficiaries, including $70,467.01, to Martha B. Woodward;

On March 7, 1927, a return on said form, for the calendar year 1926, showing a net income of $293,-913.73, and the distribution of the entire
13 amount of said net income to the said beneficiaries, including $73,403.43, to Martha B. Woodward;

On February 14, 1928 a return on said form for the calendar year 1927, showing a net income of $292,-423.74, and the distribution of the entire amount, except the capital gain stated below, to the said beneficiaries, including $73,030.94, to Martha B. Woodward. On said return for 1927 there was reported a capital gain of $4,992. as undistributable income from the sale of corpus, which figure, added to the said sum of $73,030.94, distributed to Martha B. Woodward, results in the sum of $78,022.94, the figure alleged by the respondent in the deficiency notice as the taxable income for the year 1927.

The facts and figures set forth in the said fiduciary returns for 1924, 1925, 1926 and 1927 were correct facts and figures, and the same are accepted as correct in the respondent's said deficiency notice, the only variation between the returns of the petitioner and the respondent's deficiency notice being that the petitioner treated the net income of the estate for those years as not being taxable to the estate, while the respondent in his deficiency notice treats the sums distributed to Martha B. Woodward for 1924, 1925 and 1926, and the sum distributed to her for 1927, plus the capital gain of $4,992, as being taxable to the petitioner as trustee of the estate of J. H. Woodward.

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(i.) Subsequent to the death of Martha B. Woodward, namely, on May 30, 1927, Alan H. Woodward was duly qualified by the Probate Court of Jefferson County, Alabama, as executor under her will. Upon information and belief said Alan H. Woodward, as executor of the estate of Martha B. Woodward, deceased, duly filed on September 17, 1928 with the Collector of Internal Revenue at Birmingham, Alabama claims for refund on Form 843 for 1924, 1925, 1926 and 1927 claiming the refund of $33,719.08 for 1924, $9,708.59 for 1925, $8,746.44 for 1926 and $8,868.69 for 1927, alleging in said claims for refund that such amounts should be refunded to him as executor upon the ground that to the date of her death Martha B. Woodward received in the aggregate $658,802.69, being the full amount of income to which she was entitled under Item 7 of the codicil of Joseph H. Woodward's will, which, added to the cash value of the life estates in the residence in Birmingham and the winter home in Orange County, Florida, of a cash value of not in excess of $30,000, or a total receipt by her of not more than $687,802.69, was less than the consideration paid by her for the income under

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Item 7 of the will of Joseph H. Woodward, namely, her statutory interest of $909,580.44 in the personal estate of Joseph H. Woodward, plus the value of her dower interest in the real property of which he died seized and possessed, and in said claims it was alleged that no sums received by her under said Item 7 of the codicil to the will of Joseph H. Woodward would be taxable until she should have received an amount in excess of the consideration so paid by her, which never occurred, and that all sums received by Martha B. Woodward at all times from the petitioner under said Item 7 of the codicil, including the said amounts received by her during 1924, 1925, 1926 and 1927, were not subject to tax, and that she had erroneously paid income taxes thereon. In said claims for refund were cited the cases of United States v. Bolster, 26 Fed (2d) 760 and Warner v. Walsh, 15 Fed. (2d) 367 as authorities supporting the refunds claimed. Upon information and belief, to the date of the filing of this petition the respondent has neither allowed nor paid the refunds thus claimed.

16 Wherefore, the petitioner prays that this Board may hear the proceeding and:

(1.) Find that Martha B. Woodward was a beneficiary under the estate or trust of Joseph H. Woodward, her proportion of the income of which was to be distributed currently to her by the petitioner, a fiduciary, and that the same was so distributed to her, in the same manner as to the other beneficiaries; and

(2.) Determine that the fact that the distributions received by Martha B. Woodward from the estate or trust for 1924, 1925, 1926 and 1927 may have been nontaxable to her is no bar to the allowance of the same as additional deductions in computing the net

income of the estate or trust, under Section 219 (b) (2) of the Revenue Acts of 1924 and 1926; and

(3.) Determine that the sums distributed to Martha B. Woodward, namely: For 1924, $119,891.11, for 1925, $70,467.01, for 1926 $73,403.43, and for 1927, $73,030.94, should be allowed as additional deductions in computing the net income of the estate or trust as provided by Section 219 (b) (2) of the Revenue Acts of 1924 and 1926; and

(4.) Grant such other and further relief as, under the facts of this appeal, may to the Board seem proper.

OSCAR W. UNDERWOOD, JR.
H. C. KILPATRICK,
717 Southern Building, Washington, D. C. Attorneys for the Petitioner.

17 State of Alabama,
County of Jefferson, ss.

E. L. Smith, being duly sworn, says that he is the Vice President of the Title Guarantee Loan & Trust Company, a corporation, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

(Sgd.) E. L. SMITH.

Subscribed and sworn to before me this 9th day of April, 1929.

(Seal) (Sgd.) M. E. MOSELEY,
Notary Public.

18 EXHIBIT A.

Treasury Department Washington.

Feb. 26, 1929.

Title Guarantee Loan and Trust Company, Trustee,
Estate of J. H. Woodward,
Birmingham, Alabama.

Sirs:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the years 1924, 1925, 1926 and 1927 discloses a deficiency of $44,344.11, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a re-determination of your tax liability.

However, if you do not desire to petition, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,
D. H. BLAIR,
Commissioner.
By (Sgd.) C. B. ALLEN,
Deputy Commissioner.

Inclosures: Statement, Form 866, Form 882, Form 7928.

19 Statement.

IT:AR:B-4.
JHC-60D.

In Re: Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward, Birmingham, Alabama.

Tax Liability.

Years.	Corrected Tax Liability.	Tax Previously Assessed.	Deficiency.
1924	$24,462.71	None	$24,462.71
1925	6,094.92	None	6,094.92
1926	6,644.72	None	6,644.72
1927	7,184.14	$52.38	7,131.76
Totals	$44,386.49	$52.38	$44,334.11

The adjustments recommended in the report of the Internal Revenue Agent in Charge at Nashville, Tennessee, have been approved as submitted.

The only adjustment made is the inclusion in the return of the estate as taxable income the amount distributed to Mrs. Martha B. Woodward, widow of the deceased, in accordance with the provisions of Treasury Decision 4257, published in Internal Revenue Bulletin, Volume VIII-4, Page 15, and claims filed by Mrs. Woodward. The income received by Mrs. Woodward under the will of J. H. Woodward has been considered as payment for her dower right. The payment is therefore considered a capital item and not deductible in determining taxable income of the estate.

The adjusted returns are as follows:

1924.

Interest		$56,148.03
Rent		368.12
Dividends		436,681.25
Total		$493,197.40
Taxes paid	$3,103.20	
Trust Expenses	10,229.75	
Distributed to beneficiaries	359,973.34	373,306.29
Balance taxable to estate		$119,891.11

20 Statement.

Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward.

Computation of Tax.

Net income adjusted		$119,891.11
Less:		
Dividends	$109,170.31	
Personal exemption	1,000.00	110,170.31
Income subject to normal tax		$ 9,720.80
Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $4,000.00		160.00
Normal tax at 6% on $1,720.80		103.25
Surtax on $119,891.11		24,379.71
Total tax		$24,722.96
Less: Tax paid at source		260.25
Tax assessable		$24,462.71

Tax previously assessed	None
Deficiency in tax	$24,462.71

Explanation of Items Changed.

The taxable income represents payments made to Mrs. Woodward for her dower right.

1925.

Interest received		$ 5,188.86
Interest on tax-free covenant bonds		52,050.00
Rent		325.48
Dividends		241,379.50
Total income		$298,943.84
Taxes paid	$ 3,204.31	
Trust expense	13,571.49	
Income distributed to beneficiaries	211,701.03	228,476.83
Balance income taxable to estate		$70,467.01

21 Statement.

Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward.

Computation of Tax.

Net income adjusted		$70,467.01
Less:		
Dividends	$60,344.87	
Personal exemption	1,500.00	61,844.87
Income subject to normal tax		$8,622.14
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $622.14		31.11

Surtax on $70,467.01	6,144.06
Total tax	$6,355.17
Less: Tax paid at source	260.25
Tax assessable	$6,094.92
Tax previously assessed	None
Deficiency in tax	$6,094.92

Explanation of Items Changed.

The taxable income represents payments made to Mrs. Woodward for her dower right.

1926.

Interest received	$ 56,389.52
Rents	306.38
Dividends	251,426.00
Total	$308,121.90
Taxes paid	3,459.61
Trust expense	10,748.56
Distributed to beneficiaries	220,510.30
Balance taxable to estate	$73,403.43

22 Statement.

Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward.

Computation of Tax.

Net income adjusted		$73,403.43
Less:		
Dividends	$62,856.50	
Personal exemption	1,500.00	64,356.50
Income subject to normal tax		$9,046.93

Normal tax at 1½% on $4,000.00	60.00
Normal tax at 3% on $4,000.00	120.00
Normal tax at 5% on $1,046.93	52.35
Surtax	6,672.62
Total tax	$6,904.97
Less: Tax paid at source	260.25
Tax assessable	$6,644.72
Tax previously assessed	None
Deficiency in tax	$6,644.72

Explanation of Items Changed.

The taxable income represents payments made to Mrs. Woodward for her dower right.

1927.

Interest received	$ 4,397.63
Interest on tax-free covenant bonds	52,050.00
Other income	512.15
Profit on sale	4,992.00
Dividends	251,338.50
Total income	$313,290.28
Taxes paid	$ 4,190.22
Trust expense	11,684.32
Distributed to beneficiaries	219,392.80
Balance taxable to estate	$78,022.94

23 Statement,

Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward.

Computation of Tax.

Income adjusted		$78,022.94
Less: Capital net gain		4,992.00
Income subject to normal tax		$73,030.94
Less:		
Dividends	$62,834.63	
Personal exemption	1,500.00	64,334.63
Income subject to normal tax		$8,696.31
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $696.31		34.82
Surtax on $73,030.94		6,605.57
Tax at 12½% on $4,992.00		624.00
Total tax		$7,444.39
Less: Tax paid at source		260.25
Tax assessable		$7,184.14
Tax previously assessed		52.38
Deficiency in tax		$7,131.76

Explanation of Items Changed.

The taxable income represents payments made to Mrs. Woodward for her dower right.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to her.

24 EXHIBIT B.

Item 7 of the codicil to the will of Joseph H. Woodward, dated March 16, 1911.

Item 7 All the rest and residue of the property, both real, personal and mixed property of every kind and character of which I die seized and possessed, and wheresoever situated, I give, devise and bequeath to the Title Guarantee Loan & Trust Company, a body corporate under the laws of Alabama, with its principal place of business in Birmingham, Alabama, (and hereinafter called trustee) in trust with the powers and for the uses and purposes hereinafter set forth, to-wit:

(a.) My executors are to turn over, as soon as practicable, the trust property to the trustee, and the trustee shall preserve, manage, look after and control said trust property, collecting the rents, income and profits therefrom; with power in the trustee necessary or deemed necessary for these purposes and for the protection of said trust property; or any part thereof. The trustee shall have the authority and power to sell and convey, at private sale, and without order of Court, any of the trust property coming into its custody at any time and reinvest the proceeds of any sale or sales or any money coming into its custody as trustee from time to time as it deems best, provided, however, that the trustee shall have no authority or power to sell any property belonging to the trust estate without the written approval of my son, Alan H. Woodward and Reginald H. Banister, or one of them, so long as they or either of them may live, and are competent to act, and are personally present in the United States, and provided further that said trustee shall have no authority or power to make a reinvestment of the trust funds at any one time amounting to a sum exceeding Ten Thousand ($10,000.00) Dollars, without the written

approval of my son, Alan H. Woodward, and Reginald H. Bannister, or one of them, so long as they, or either of them may live and are competent to act and are personally present in the United States.

(b.) The trustee is authorized and directed to pay from income all cost and expense incident to the protection and preservation of the trust estate, including taxes and insurance on the trust property, and including taxes, insurance and repairs of the property devised by my wife for life, and compensation to the trustee.

(c.) I direct the trustee to pay over from the net income from the trust estate the sum of Twenty-five ($25.00) Dollars per month to Marion Wallace during the life of Marion Wallace.

All the rest and residue of the net income from the trust estate, I direct the trustee to pay over as and when received share and share alike, to my wife, Martha Woodward, my son Alan H. Woodward, my daughter, Bertha W. Underwood, and my daughter, Margaret W. Hopkins, or the survivors of them (except the share of my daughter Margaret W. Hopkins is to be subdivided as hereinafter set forth).

The share of the net income set aside for my daughter, Margaret W. Hopkins, I direct to be subdivided, and one-third of same is to be paid over to Margaret Evins Spencer (if she be living), and one-third is to be paid over to Josephine W. Evins after said Josephine W. Evins arrives at the age of twenty-one years, two-thirds to be paid over to my said daughter, Margaret W. Hopkins, until Josephine W. Evins arrives at the age of twenty-one years, but with the expectation that my daughter Margaret W. Hopkins will provide for the support, maintenance and education of said Josephine W. Evins until she arrives at the age of

twenty-one years, one-third to be paid over to my daughter Margaret W. Hopkins after Josephine W. Evins arrives at the age of twenty-one years. In the event either Margaret W. Spencer or Josephine W. Evins should die, if Margaret W. Hopkins be living, she is to take the share of the income which the deceased would have taken if living. Upon the death of either of my children, the child or children of my deceased child shall take the share of the income which the parent would have taken if living.

(d.) This trust is to continue during the life of the survivor of my three children, Alan H. Woodward, Bertha W. Underwood, and Margaret W. Hopkins, and the trust is to terminate at the time of the death of the survivor of my three children.

(e.) In the event my daughter Bertha W. Underwood should die leaving no child or children surviving her, then and in that event if her husband, Oscar W. Underwood, be living, I direct the trustee to deliver to Oscar W. Underwood, as a gift to him, Fifty Thousand ($50,000.00) Dollars, face amount of bonds bearing interest at the rate of 5% per annum from bonds belonging to the trust estate, and in the custody of the trustee, to be selected by my son and Reginald H. Banister, or the survivor of them, if they are competent to act, and otherwise to be selected by the trustee.

This conditional gift to my son-in-law Oscar W. Underwood is in no way intended as an expression of a preference of him over my son-in-law, Thomas
26 W. Hopkins, but is intended as an equalization between my children, as my daughter Bertha W. Underwood now has no child, and this gift is conditioned on my said daughter at her death leaving no child surviving her, whereas, my daughter Margaret W. Hopkins has two children, and they will share as beneficiaries on final division of my estate.

(f.) It is my will and I direct the trustee on the termination of this trust under the provisions hereof, to divide the trust property, share and share alike, between my grandchildren then living, the child or children or descendants of any deceased grandchild taking the share which the parent would have taken if living, provided, however, that in the event my wife, Martha Woodward, should be living when the trust terminates under the provisions hereof, the trustee is to set aside from the trust property in its custody the sum of One Hundred Thousand ($100,000.00) Dollars to be held and used by the trustee to the extent necessary for the comfortable support and maintenance of my wife during her life, and after her death, the balance of said trust fund of One Hundred Thousand ($100,000.00) Dollars, if any, shall be divided between my grandchildren on the same basis as set forth in this paragraph.

(g.) The trustee, if required, shall give bond with surety company as security to guarantee faithful performance of its duties, in such amount and at such time or times as may be in writing required by my wife, and children, or a majority of them or by the survivors or survivor of them, but at the cost and expense of the trust estate. I direct that the trustee shall rent and keep a safety-deposit box and keep all securities such as principal notes, stocks and bonds in such safety box, and that it must take at least three keys to open said box, and that one of said keys shall be turned over to my wife, Martha Woodward, and retained by my wife, Martha Woodward, or my son, Alan H. Woodward, or Reginald H. Banister (as they may from time to time agree among themselves), and the trustee shall not enter said box without the presence of either my wife or my son, or Reginald H. Banister, or some one designated in writing by them, or by the custodian of the key, so long as they, or either of them, be living

and competent to act. In the event my said wife and son and Reginal H. Banister should all die or become incompetent to act before the termination of this trust, then my daughters or one of them, if they be living and competent to act, shall be the custodian of the key to the box, and be present in person or by agent designated in writing at the opening of the box, or in the event both of my daughters should be dead or incompetent to act, my adult grandchildren living shall in writing to the trustee designate a custodian of the key who is to be present in person or by duly designated agent at the opening of the box.

27 In making division of the trust property on the termination of this trust, under the provisions hereof, the trustee shall have the authority and power to divide the trust property in kind or partly in kind, or may sell and convey at private sale and without order of Court, such of the trust property and security as it may deem necessary, and divide the proceeds or equalize the division with the proceeds.

(h.) It is my will, and I direct that all stock (in corporations) belonging to the trust estate shall be represented and voted at all meetings of stockholders by or under the direction of my son Alan H. Woodward so long as he may live, and be competent to act, or by Reginald H. Banister so long as he may live and be competent to act, and to this end, the trustee is directed to execute to my son, or to whomsoever he may in writing designate, a proxy or power of attorney authorizing the voting of stock from time to time, or if my son should fail or decline to request a proxy or power of attorney, a proxy or power of attorney shall be executed by the trustee to Reginald H. Banister, or to whomsoever he may in writing designate, authorizing the voting of the stock.

The trustee shall not be required to file an inventory of the trust property, in its custody, in any Court, but the trustee shall, at all times, have and keep an inventory of the trust property on hand, and shall exhibit such inventory at all reasonable times to any person beneficially interested who desires to see the same.

(i.) The trustee shall be entitled to fair and reasonable compensation for all services in administering the trust under the provisions hereof, to be deducted from the income as received, and I direct that my son, Alan H. Woodward, and Reginald H. Banister, if living at the time of my death, or the survivor of them, shall designate in writing and agree with the trustee as to the amount that they consider fair and reasonable compensation to be paid to the trustee, and the compensation if agreed to by the trustee shall be the compensation which the trustee is to receive, and if the trustee does not agree to the compensation fixed by my son and Reginald H. Banister the trustee can resign or be removed under the provisions hereof.

28 (j.) The trustee may resign this trust at any time, or the trustee may be removed as trustee at any time by my wife and son and Reginald H. Banister, or any two of them, during their lives, without cause, and a corporation appointed as successor trustee, and in the event a successor trustee is appointed, each and all of the powers conferred upon the trustee under the provisions hereof, shall pass to and inure to the successor trustee, and in case of the resignation of the trustee, the said three parties, or any two of them, shall appoint a successor trustee, and in like manner, at any time, a trustee may be removed and a successor trustee appointed, provided, however, that no trustee shall be removed until all compensation to which the trustee is entitled is paid.

Any resignation or appointment of a trustee under the provisions hereof, shall be in writing, executed by the proper parties, acknowledged in the same way as deeds are required to be acknowledged, under the laws of Alabama, and filed for record in the probate office of Jefferson County, Alabama.

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ANSWER.

United States Board of Tax Appeals.

Filed May 23, 1929.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,

vs. Docket No. 43615.

Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits all the material allegations contained in paragraph 1 of the petition.

2. Admits all the material allegations contained in paragraph 2 of the petition.

3. Admits all the material allegations contained in paragraph 3 of the petition.

4—(a), (b), (c), (d) and (e). Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph 4 of the petition.

4—(f). Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated February 26, 1929.

5. Denies all the material allegations contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petitioner's petition contained not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
C. M. Charest,
General Counsel, Bureau of Internal Revenue.

Of Counsel:

J. ARTHUR ADAMS,
Special Attorney, Bureau of Internal Revenue.

PETITION.

United States Board of Tax Appeals.

Filed Dec. 8, 1930.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
v. Docket No.51185.
Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Com-

missioner of Internal Revenue in his notice of deficiency, (IT: AR: C—1: MEH—60D) dated October 15, 1930, and as a basis of its proceeding alleges as follows:

(1.) The petitioner is a corporation, with principal office at the Title Guarantee Building, Birmingham, Alabama, and is trustee under the will of J. H. Woodward, as hereinafter set forth.

(2.) The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner by registered mail on October 15, 1930, and was received by the petitioner in due course of mail.

(3.) The taxes in controversy are income taxes for the calendar year 1928, and for $1,130.84.

32 (4.) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a.) The respondent erred in determining that any deficiency is due for the year 1928.

(b.) Under the applicable provisions of Section 161 of the Revenue Act of 1928, the respondent erred in determining that the petitioner is liable for any tax for the year 1928.

(c.) The respondent erred in not allowing, under the provisions of Section 161 (b) and Section 162 (b) of the Revenue Act of 1928 as an additional deduction in computing the net income of the estate or trust of Joseph H. Woodward for the calendar year 1928, the amount of $33,852.00 distributed currently to Martha B. Woodward by the petitioner, as fiduciary, to her as beneficiary of the said estate or trust.

(d.) The respondent erred in not allowing as an additional deduction in computing the net income of the estate or trust of J. H. Woodward, pursuant to Section 161 (b) and Section 162 (b) of the Revenue Act of 1928 for the calendar year 1928, all sums distributed by the petitioner as fiduciary to Martha B. Woodward as beneficiary under the trust created by the will of J. H. Woodward, and, as a result of not allowing such additional deductions, erred in determining an adjusted net income of the petitioner as trustee of said estate or trust for said calendar year in the amount of $33,852.00.

33 (e.) The respondent erred in not determining, under Section 161 (b) and Section 162 (b) of the Revenue Act of 1928, that there was no taxable net income for the year 1928.

(5.) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a.) Martha B. Woodward, a citizen of the United States and a resident of Birmingham, Alabama, was the wife of Joseph H. Woodward, a citizen of the United States and a resident of Birmingham, Alabama, who died on December 15, 1917. The said Martha B. Woodward died on May 13, 1928.

(b.) Joseph H. Woodward died on December 15, 1917, seized and possessed of real and personal property having a gross value at the time of his death of $4,883,622.56, and a value as a net estate of $4,641,577.16, according to the final determination of D. H. Blair, Commissioner of Internal Revenue, by decision dated December 14, 1922, contained in a letter dated that date addressed to Alan H. Woodward, et al., executors, estate of J. H. Woodward, under symbols "ET—102—C1. R.—LCM—District of Alabama—

Estate of J. H. Woodward date of death December 15, 1917", which decision referred to and adopted a number of determinations made in a previous letter from the said Commissioner, dated October 12, 1920. Said decision determined the following expenses of administration and taxes, and determined that the estate of Joseph H. Woodward had the following values at the time of his death:

34 Gross value of real estate, $385,771.49 (included in which was a value of $40,000 for his residence in Birmingham, and a value of $37,000 for his winter home in Orange County, Florida); gross value of personal property, $4,497,851.37; expenses of administration $242,045.70, and the Federal estate tax, $617,483.89, making the aggregate expenses of administration $859,529.59. Under the law of Alabama the said expenses were primarily chargeable to the personal property, and the net personal estate was $3,638,321.78.

(b.) Above and beyond the value of the dower rights of Martha B. Woodward in the real property owned by Joseph H. Woodward at the time of his death, which dower rights had a substantial value, the said Martha B. Woodward, under Section 3763 of the Code of Alabama of 1907 (now Section 7374 of the Code of Alabama of 1923), was entitled, upon the death of Joseph H. Woodward, to a child's part in the personal estate of Joseph H. Woodward. Joseph H. Woodward had three children, all of whom survived him, namely, Alan H. Woodward, Mrs. Margaret W. Hopkins and Mrs. Bertha W. Underwood. Under said section of the Code of Alabama, the decedent, Joseph H. Woodward, having had three children, Martha B. Woodward was entitled, upon his death, to a child's part of one-fourth of the value of his personal estate, and under said provision she then became entitled to,

and was seized and possessed of, one-fourth
35 of the personal estate of the said Joseph H. Woodward, or personal property to the value of $909,580.44, wholly above and beyond her dower right in his real property, to which she was also entitled.

(c.) Joseph H. Woodward died testate, and his last will and testament, with a codicil thereto, was duly probated in the Probate Court of Jefferson County, Alabama, on December 21, 1917.

(d.) Under his will and codicil, Joseph H. Woodward devised to Martha B. Woodward a life estate in his residence in Birmingham and a life estate in his winter home in Orange County, Florida. She was then of an advanced age; and the cash value of these life estates was, upon information and belief, not in excess of $30,000, and, upon information and belief, said sum was less than the value of her dower right, which, under the law of Alabama and the law of Florida, in which two states all of his real property was situated, is a one-third interest for life in the real estate of which her deceased husband died seized and possessed.

(e.) By Item 7 of the codicil to the will of Joseph H. Woodward he devised and bequeathed all of his residuary estate of every kind and character, of which he died seized and possessed, to the petitioner, Title Guarantee Loan & Trust Company, a corporation of
Birmingham, Alabama, as trustee, and the
36 said trustee was, by the terms of said Item 7, directed to pay the cost and expense incident to the preservation of the trust estate, and further to pay from the income from the trust estate $25 per month to one Marion Wallace during her life, and to pay all of the rest of the net income from the trust

estate, as and when received, to certain persons, his wife, Martha B. Woodward, to receive one-fourth thereof, and the other said persons to receive the remaining three-fourths in the proportions set forth in the said Item 7. The petitioner, as trustee, has at all times strictly performed its duties as trustee. From the time the petitioner qualified as such trustee to the date of Martha B. Woodward's death, the petitioner disbursed the said one-fourth of all of the rest of the net income from the trust estate, as and when received, to Martha B. Woodward. The remaining three-fourths of the said net income, as well as the $25 per month to Marion Wallace, has at all times been disbursed by the petitioner to those persons in full, as and when received, and, upon information and belief, such persons accounted for the same upon their individual income tax returns at all times; and the respondent does not in his said deficiency notice assert any claim against the petitioner on account of such disbursements, but has duly allowed all of such disbursements as additional deductions in computing the net income of the trust estate, as required by Section 162 (B) of the Revenue Act of 1928, and corresponding provisions of prior revenue laws, and the deficiency or deficiencies asserted in said deficiency notice are based
37 wholly upon the sums to which Martha B. Woodward was entitled and which were distributed to her during the calendar year 1928.

(f.) Under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907 (now Sections 10593 and 10594 of the Code of Alabama of 1923), a widow may in all cases dissent from the will of her husband, and, in lieu of the provisions made for her by such will, take her dower in the land and such portion of the personal estate as she would be entitled to in the case of intestacy. The said provisions of law provided for the filing of a written dissent with the

Judge of probate of the county in which the will is probated within twelve months from the probating of the will. Martha B. Woodward, however, did not dissent from the will and codicil of Joseph H. Woodward, but accepted the provisions made for her therein, and received to the date of her death the income allotted to her by Item 7 of the codicil. From the date of the death of Joseph H. Woodward until the date of her death, namely, May 15, 1928, she received a total of $658,802.69 as such income, which was the full amount of the income to which she was entitled under said Item 7, the petitioner having, as trustee, pursuant to the terms of such provision, disbursed all of such income and retained in the trust estate only the principal or corpus thereof. Said sum of $658,802.69 included the sum of $33,852.00, which was distributed to Martha B. Woodward during the period from January 1 to May 13, 1928, and which is asserted as the net income of the petitioner, as trustee of the estate of J. H. Woodward, and upon which the deficiency for the year 1928 is based, as is more fully set forth in the said deficiency notice.

38

(g.) This petitioner, as trustee of said trust estate, duly filed with the Collector of Internal Revenue at Birmingham, Alabama, fiduciary returns of income for all of the years during which this petitioner has acted as trustee under the said trust, and, in particular, with reference to the year 1928, this petitioner on February 7, 1929, filed upon Form 1041 with the said Collector a fiduciary return of income in the name of "Estate of J. H. Woodward, Title Guarantee Loan & Trust Company, Birmingham, Alabama" for the calendar year 1928, showing a net income of $345,246.01, and the distribution of the entire amount of said net income to the said beneficiaries, including $33,852.00 to Martha B. Woodward.

The facts and figures set forth in the said fiduciary return for 1928 were correct facts and figures, and the same are accepted as correct in the respondent's said deficiency notice, the only variation between the return of the petitioner and the respondent's deficiency notice being that the petitioner treated the net income of the estate for the year 1928 as not being taxable
39 to the estate, while the respondent in his deficiency notice treats the sums distributed to Martha B. Woodward during the period from January 1 to May 13, 1928, as being taxable to the petitioner as trustee of the estate of J. H. Woodward.

Wherefore, the petitioner prays that this Board may hear the proceeding and:

(1.) Find that Martha B. Woodward was a beneficiary under the estate or trust of Joseph H. Woodward, her proportion of the income of which was to be distributed currently to her by the petitioner, a fiduciary, and that the same was so distributed to her, in the same manner as to the other beneficiaries; and

(2.) Determine that the fact that the distributions received by Martha B. Woodward from the estate or trust for 1928 may have been non-taxable to her is no bar to the allowance of the same as additional deductions in computing the net income of the estate or trust, under Section 162 (b) of the Revenue Act of 1928; and

(3.) Determine that the amount of $33,852.00 distributed to Martha B. Woodward in 1928 should be allowed as an additional deduction in computing the net income of the estate or trust as provided by Section 162 (b) of the Revenue Act of 1928; and

(4.) Grant such other and further relief as, under the facts of this appeal, may to the Board seem proper.

OSCAR W. UNDERWOOD, JR.
H. C. KILPATRICK,
717 Southern Building Washingfon, D. C. Attorneys for the Petitioner.

State of Alabama,
County of Jefferson, ss.

E. L. Smith, being duly sworn, says that he is the Vice President of the Title Guarantee Loan & Trust Company, a corporation, and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

E. L. SMITH.

Subscribed and sworn to before me this 4th day of December, 1930.

ETHEL M. WARE,
Notary Public.

"EXHIBIT A.".

Treasury Department Washington.

October 15, 1930.

Title Guarantee Loan & Trust Company, Trustee,
Estate of J. H. Woodward,
Birmingham, Alabama.

Sirs:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of $1,130.84 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P—7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By J. C. WILMER,
Deputy Commissioner.

42 STATEMENT.

IT:AR:C—1—MEH—60D.

In re: Title Guarantee Loan & Trust Company, Trustee, Estate of J. H. Woodward, Birmingham, Ala.

Tax Liability.

Year	Corrected Tax Liability	Tax Previously Assessed	Deficiency
1928	$1,130.84	None	$1,130.84

. The report of the internal revenue agent in charge at Nashville, Tennessee, for the year 1928, has been reviewed and accepted as submitted.

Net income reported on return (1040)		None
Add:		
1. Dividends		$28,732.62
2. Other income		5,119.38
Total net income		$33,852.00
Less:		
Dividends	$28,732.62	
Personal exemption	1,500.00	30,232.62
Income subject to normal tax		$ 3,619.38
Normal tax at 1 1/2% on $3,619.38		54.28
Surtax on $33,852.00		1,206.68
Total tax		$ 1,260.96
Less: Tax paid at source		130.12
Tax assessable		$ 1,130.84
Tax previously assessed		None
Deficiency in tax		$ 1,130.84

43 . Explanation of Changes.

1 and 2. These items reported on form 1041 as having been paid to Mrs. Woodward have been included for income tax purposes on form 1040 for the estate.

In accordance with I. T. 2480, Cumulative Bulletin VIII-2, page 141, it is held that the income from property held by an estate or trust to satisfy annual payments to a widow in lieu of her dower or statutory interest is not an allowable deduction in the return of

the estate or trust prior to the time such payments equal the value of her dower or statutory interest in her deceased husband's estate.

Inasmuch as the revenue agent states that the total payments received by Mrs. Woodward were less than the value of her dower or statutory rights, the amounts paid to her in 1928 were taxable to the estate.

Payment should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

ANSWER.

44 United States Board of Tax Appeals.

Filed Jan. 26, 1931.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs. Docket No. 51185.
Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

(1.) Admits all the material allegations contained in paragraph (1) of the petition.

(2.) Admits all the material allegations contained in paragraph (2) of the petition.

(3.) Admits that the tax in controversy is income tax for the year 1928, but denies that the amount of

tax in controversy is the amount shown in paragraph (3) of the petition.

(4)—(a), (b), (c), (d) & (e). Denies that the respondent committed error in the determination of the deficiency as alleged in paragraph (4) of the petition.

(4)—(f.) Denies that any error was made in the determination of the deficiency referred to in deficiency letter dated October 15, 1930.

(5.) Denies all the material allegations contained in paragraph (5) of the petition.

(6.) Denies generally and specifically each and every allegation in the petitioner's petition contained not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
C. M. Charest,
General Counsel, Bureau of Internal Revenue.

Of Counsel:

J. ARTHUR ADAMS,
Special Attorney, Bureau of Internal Revenue.

Title Guarantee Loan & Trust Company, Trustee of the Estate of J. H. Woodward, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 43615, 51185.

H. C. Kilpatrick, Esq., for the petitioner.
Prew Savoy, Esq., for the respondent.

MEMORANDUM OPINION.

45 United States Board of Tax Appeals.

TRAMMELL:

These proceedings are for the redetermination of deficiencies in income taxes for the years 1924, 1925, 1926 and 1927, in Docket No. 43615 in the amounts of $24,462.71, $6,094.92, $6,644.72 and $7,131.76, respectively, and for the year 1928 in Docket No. 51185, in the amount of $1,130.84.

The question involved is whether the petitioner is entitled to a deduction on account of annual payments made to the widow in lieu of dower.

The two proceedings were consolidated for hearing and the facts either admitted in the answer or stipulated.

1. The petitioner is a corporation with its principal office in Birmingham, Alabama, and is trustee under the will of J. H. Woodward, deceased. J. H. Woodward (hereinafter called the testator), while a resident of Alabama, died testate December 15, 1917. The testator's last will and testament, dated March 16, 1911, together with a codicil thereto, dated August 7, 1915, were admitted to probate in the Probate Court of Jefferson County, Alabama, on December 21, 1917, and letters testamentary were issued by the Court to the executors therein named.

46 2. After making specific bequests, the testator disposed of the risiduary estate by Item 7 of the codicil, the material portions of which are as follows:

"Item 7—All the rest and risidue of the property, both real, personal and mixed property of every kind

and character of which I die seized and possessed, and wheresoever situated, I give, devise and bequeath to the Title Guarantee Loan & Trust Company, a body corporate under the laws of Alabama, with its principal place of business in Birmingham, Alabama; (and hereinafter called trustee) in trust with the powers and for the uses and purposes hereinafter set forth, to-wit:

(a.) My executors are to turn over, as soon as practicable, the trust property to the trustee, and the trustee shall preserve, manage, look after and control said trust property, collecting the rents, income and profits therefrom, with power in the trustee necessary or deemed necessary for these purposes and for the protection of said trust property, or any part thereof. * * *

(b.) The trustee is authorized and directed to pay from income all cost and expense incident to the protection and preservation of the trust estate, including taxes and insurance on the trust property, and including taxes, insurance and repairs on the property devised to my wife for life, and compensation to the trustee.

(c.) I direct the trustee to pay over from the net income from the trust estate the sum of Twenty-Five ($25.00) Dollars per month to Marion Wallace during the life of Marion Wallace.

All the rest and risidue of the net income from the trust estate, I direct the trustee to pay over as and when received share and share alike, to my wife, Martha Woodward, my son Allan H. Woodward, my daughter, Bertha W. Underwood, and my daughter, Margaret W. Hopkins, or the survivors of them. * *

(d.) This trust is to continue during the life of the survivor of my three children, Allan H. Woodward,

Bertha W. Underwood, and Margaret W. Hopkins, and the trust is to terminate at the time of the death of the survivor of my three children.

47 (f.) It is my will and I direct the trustee on the termination of this trust under the provisions hereof, to divide the trust property, share and share alike between my grandchildren then living, the child or children or descendants of any deceased grandchild taking the share which the parent would have taken if living, provided, however, that in the event my wife, Martha Woodward should be living when the trust terminates under the provisions hereof, the trustee is to set aside from the trust property in its custody the sum of One Hundred Thousand ($100,000.00) Dollars to be held and used by the trustee to the extent necessary for the comfortable support, and maintenance of my wife during her life, and after her death, the balance of said trust fund of One Hundred Thousand ($100,000.00) Dollars, if any, shall be divided between my grandchildren on the same basis as set forth in this paragraph. * * *"

3. The property mentioned in item 7 (b) of the codicil was the property specifically devised by testator to his wife, for and during her life, by item 6 of the will and item 4 of the codicil, which property consisted of testator's homeplace in Birmingham, Alabama, together with the furniture, furnishings, pictures and fixtures therein, and his winter residence in Florida, together with all furniture and furnishings used in connection therewith. Item 4 of the codicil contained the following provisions.

"I direct the trustee hereinafter named to pay all taxes and assessments on the property devised and bequeathed to my wife, by Item Six (6) of my said will and by this item of this codicil, and to keep the

house and other buildings insured and in repair at the cost and expense of the trust estate, relieving my wife from this burden as provided in Item Six (6) of said will."

4. The executors paid the specific bequests made in the will, and thereafter in the year 1919 the residuary estate was delivered to the petitioner as trustee. The petitioner has acted as such trustee continuously since that time.

48 5. The testator left surviving him a widow, Martha B. Woodward, and three children, A. H. Woodward, Bertha W. Underwood, and Margaret W. Hopkins.

6. Martha B. Woodward did not dissent from the will; she died testate and a resident of Alabama, May 13, 1928 at the age of eighty-two years. The testator's three children, who were also her children, were all living at the time of her death.

7. The income from the trust property was collected by the petitioner each year from the time the trust property came into its custody up to and including May 13, 1928, and after paying (from the gross income) currently, the expenses directed to be paid by Item 7 of said codicil, the balance, the net income, was distributed currently as and when received throughout the period in question by paying over and delivering the same to the respective persons, including Mrs. Martha B. Woodward, the widow, in the respective amounts to which they were respectively entitled as required under the provisions of paragraph (c) of Item 7 of the codicil.

8. The amounts so paid by petitioner to Martha B. Woodward during her life aggregated $658,792.69,

of which $15,472.07 represented distributions of tax-free interest from United States and state bonds.

9. If the testator had died intestate, under the statutes of Alabama, Code of 1907, Sections 3763, 3812 and 3813, in the instant case, the widow would have been entitled to a child's part, or one-fourth
49 of the personal estate of her deceased husband, and would have been entitled, for life, to the use of one-third of his real property; but, as the testator died testate in the instant case, under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907, the widow, Martha B. Woodward, was entitled to dissent from the will of her deceased husband; and, in lieu of the provision made for her by his will, take her dower in the lands and such portion of the personal estate as she would have been entitled to in case of intestacy, provided she deposited a written dissent with the Judge of Probate of the County in which the will was probated within twelve months from the probate of the will, and a record entry was required to be made, specifying the date on which the dissent was made. The widow did not dissent from the will.

10. The net value of the personal property of the testator at the time of his death was $3,688,321.78. The net value of the real property of the testator at the time of his death was $385,771.49.

11. If, in the instant case, the widow, Martha B. Woodward had dissented from the will, she would have been entitled to a child's part, or one-fourth of the value of said personal estate, or $909,580.44, and would have been entitled to the use of one-third of the real estate for and during the term of her life, which dower right would have had a value of at least $30,000.00; that is, her interest in both real and personal property would have been at least $939,580.44.

12. The amount paid out by the petitioner for taxes, insurance and repairs on the real and personal property devised for life to Martha B. Woodward by Item 6 of the will and Item 4 of the codicil,
50 amounted during her life, in the aggregate, to $29,335.18, but this sum paid for these purposes by the trustee was paid from the gross income of the trust estate in accordance with the requirements of Item 7 (b) of the codicil, and not from the distributive share of Martha B. Woodward. The widow received no benefits under the will from the date of her husband's death to her own death other than as shown in these findings.

13. For the years 1919 to 1928, both inclusive, the petitioner, as trustee of this estate, filed fiduciary returns on Form 1041, with the Collector of Internal Revenue for the District of Alabama, and in computing therein taxable net income of the estate, deducted from gross income the amounts so distributed to Martha B. Woodward, as well as amounts similarly distributed to the other beneficiaries named under the testamentary trust described in paragraph (c) of Item 7 of the codicil.

14. Martha B. Woodward made and filed with the said Collector, an individual income tax return for each of the calendar years 1919 to 1927, both inclusive, and, in each such return, she included the amount that she had received from the petitioner under the trust during the taxable year for which the return was made, and paid income taxes thereon; but, subsequent to the decision of the United States Circuit Court of Appeals for the First Circuit in the case of United States v. Bolster, 26 Fed. (2d), 760, Martha B. Woodward having died as heretofore stated, her executor filed claims for refund of taxes paid by her on such
51 distributions received during each of the taxable years 1923 to 1927, both inclusive, ex-

cepting such part as was paid for the year 1923 as was barred from refund by the statute of limitations, and the Commissioner allowed these claims for refund, and refunded to the executor of Martha B. Woodward $65,092.96, with interest thereon, the refund being paid to said executor in January, 1930.

15. The executor of the estate of Martha B. Woodward made and filed with the same collector an individual income tax return for the period from January 1, to May 13, 1928, both inclusive, and in such returns the said executor did not include the amount distributed by petitioner during the period in question.

16. The deficiencies asserted by the respondent in these proceedings result solely from his action in disallowing the deductions so claimed of amounts distributed from sources other than tax-free interest to Martha B. Woodward, as described in Finding No. 8.

17. The executor of the estate of Martha B. Woodward entered into an agreement with petitioner on June 29, 1929, that the said executor will pay the expense of contesting the deficiencies asserted herein, and that in the event such deficiencies are upheld by a decision of the Board which has become final, said executor will reimburse petitioner for any amounts paid as a result of such decision.

18. The Commissioner of Internal Revenue has allowed the deductions which were made by the petitioner upon its fiduciary returns on Form 1041 for the years 1919 to 1928, both inclusive, in so far as all distributions made to the other beneficiaries, namely,

A. H. Woodward, Bertha W. Underwood,
52 Martha W. Hopkins and Marion K. Wallace,
(who was entitled to and was paid $300.00

each year pursuant to said will and codicil) are concerned, but the Commissioner disallows the deduction of all amounts distributed by the petitioner to Martha B. Woodward during her life except distributions of tax-free interest as set out in Finding No. 8.

Both parties to this proceeding agree that the case is controlled by our decision in Julia Butterworth, et al., Trustee Under the Will of William B. Butterworth, Deceased, 23 B. T. A. 838. Under the authority of that decision we hold that the amounts paid to the widow were paid to her in satisfaction of or as compensation for, her dower rights and are not distributions of income within the meaning of the statute and hence are not deductible in computing the net income of the trustee.

Judgment will be entered for the respondent.

Entered: Feb. 12, 1932.

Title Guarantee Loan & Trust Company, Trustee of the Estate of J. H. Woodward, Petitioner,

v. Docket No. 43615.

Commissioner of Internal Revenue, Respondent.

DECISION.

53 United States Board of Tax Appeals Washington.

Pursuant to the determination of the Board, as set forth in its report promulgated memorandum opinion entered February 12, 1932, it is ordered and decided: That there are deficiencies as follows:

Year	Amount
1924	$24,462.71
1925	$ 6,094.92
1926	$ 6,644.72
1927	$ 7,131.76

Enter: Entered Feb. 13, 1932.
(Signed) CHARLES M. TRAMMELL,
(Seal) Member.

Title Guarantee Loan & Trust Company, Trustee of the Estate of J. H. Woodward, Petitioner,

v. Docket No. 51185.

Commissioner of Internal Revenue, Respondent.

DECISION.

54 United States Board of Tax Appeals, Washington.

Pursuant to the determination of the Board, as set forth in its report promulgated memorandum opinion entered February 12, 1932, it is ordered and decided: That there is a deficiency of $1,130.84 for the year 1928.

Enter: Entered Feb. 13, 1932.
(Signed) CHARLES M. TRAMMELL,
(Seal) Member.

Title Guarantee Loan and Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,

v. Docket No. 43615.

Commissioner of Internal Revenue, Respondent.

PETITION FOR REVIEW.

55 United States Board of Tax Appeals.

Filed Mar. 1, 1932.

Now comes the petitioner, Title Guarantee Loan and Trust Company, as Trustee of the Estate of J. H. Woodward, by its attorneys, E. J. Smyer, Oscar W. Underwood, Jr., and H. C. Kilpatrick, and respectfully shows unto the Court the following:

I.

The petitioner is a corporation organized and existing under the laws of the State of Alabama, with principal office at Birmingham, Alabama, and is trustee under the will of J. H. Woodward, deceased, who died testate on December 15, 1917, while a resident of Alabama. For the taxable years involved in this proceeding, namely, the calendar years 1924 to
56 1927, inclusive, petitioner filed its returns as such trustee for the purpose of the federal income tax with the Collector of Internal Revenue for the District of Alabama, and the office of said Collector of Internal Revenue is located within the judicial circuit of the United States Circuit Court of Appeals for the Fifth Circuit.

II.

The nature of the controversy, so far as here pertinent, is as follows:

Under his will and a codicil thereto, both of which were duly admitted to probate in the Probate Court of Jefferson County, Alabama, J. H. Woodward (hereinafter called the testator) devised his residuary estate to petitioner, as trustee, to be held in trust by peti-

tioner during the life of the survivor of testator's three children, and upon the death of such survivor the corpus to be distributed among the testator's grandchildren then living or their descendants. The trust estate has not been terminated, but is still in existence.

The codicil provided for the payment from income of all cost and expense incident to the protection and preservation of the trust estate, and of taxes, insurance and repairs upon property specifically devised
57 to testator's wife for life; provided for the payment from net income of $25 per month to one Marion Wallace during her life; and provided that all the rest and residue of the net income from the trust estate, as and when received, should be paid over to testator's wife and the other beneficiaries designated in the will, the said wife to receive one-fourth of such net income during her life and the duration of the trust.

The testator's widow did not dissent from the will, as she had a right to do, under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907. The trust property was delivered to petitioner, as trustee, in the year 1919, and petitioner has acted as such trustee since that time. From that time to and including December 31, 1927, petitioner collected the income from the trust property and, after paying from gross income currently the costs and expenses specified by the codicil, it distributed the balance, the net income, currently, as and when received, by paying it over to the beneficiaries as directed by the codicil. The amounts so paid over to the widow to and including December 31, 1927, aggregated $624,940.69,
58 of which $348,492.49 was paid over during the taxable years here involved, as follows:

Year	Total Paid	From Tax-free Bond Interest	Balance
1924	122,816.11	2,925.00	119,891.11
1925	73,392.01	2,925.00	70,467.01
1926	76,328.43	2,925.00	73,403.43
1927	75,955.94	2,925.00	73,030.94
Totals	348,492.49	11,700.00	336,792.49

During the years 1919 to 1927, inclusive, petitioner expended for taxes, insurance and repairs on the property specifically devised to the widow $27,643.89, which amount was paid from gross income of the trust and not from the widow's distributive share of the net income. The widow received no other benefits from the trust through 1927 other than as shown herein.

The value of the widow's dower and statutory interest in the testator's property, had she dissented from the will, would have been at least $939,580.44.

For the years 1919 to 1927, both inclusive, the petitioner, as trustee of this estate, filed fiduciary returns on Form 1041 with the said Collector, and, in computing therein taxable net income of the estate, deducted from gross income the amounts distributed to the trust beneficiaries named in the will, including the amounts above specified as amounts paid to the widow.

For the taxable years here involved, the respondent has disallowed the deduction of amounts so
59 distributed to the widow from sources other than tax-free interest, and as a result of such disallowance determined deficiencies in income taxes for the years 1924 to 1927, inclusive, as follows:

1924	$24,462.71
1925	6,094.92
1926	6,644.72
1927	7,131.76

The Board of Tax Appeals, by its decision herein, approved respondent's action. The hearing before the Board was held January 20, 1942. The findings of fact and opinion of the Board were entered February 12, 1942, and its final order, fixing the deficiencies at the amounts determined by the respondent, was entered February 13, 1942.

III.

Petitioner, being aggrieved by the conclusions of law contained in said decision and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Fifth Circuit.

Wherefore, it petitions that a transcript of record be prepared in accordance with the rules of the said United States Circuit Court of Appeals for the Fifth Circuit and transmitted to the Clerk of said Court for filing and appropriate action to the end that the error hereinafter set forth may be reviewed and corrected by the said Court.

(9) IV.

The petitioner's assignment of error is as follows:

The Board erred in holding that, in computing the net income of the trust established by the will and codicil thereto of J. H. Woodward, for each of the calendar years 1924 to 1927, inclusive, petitioner, as trustee, was not entitled to deduct the amount of the income of the trust, for each and all of its said taxable years, which was distributable currently and which was distributed currently by petitioner, as such trustee, to the widow of said J. H. Woodward, who was one of the beneficiaries of said trust.

Wherefore, your petitioner prays that the Circuit Court of Appeals for the Fifth Circuit review the action and decision of the Board of Tax Appeals in this case and reverse the decision; and that your petitioner have all such other and further relief as it is entitled to and as to the Court may seem just and proper.

E. J. SMYER,
Title Bldg.,
Birmingham, Alabama.

OSCAR W. UNDERWOOD, JR.,
717 Southern Building,
Washington, D. C.

R. C. KILPATRICK,
717 Southern Bldg.,
Washington, D. C.,
Attorneys for petitioner.

61 District of Columbia, ss.

Oscar W. Underwood, Jr., being duly sworn, says that he is one of the attorneys for the petitioner in the above entitled cause; that he has read the foregoing petition and assignment of error and is familiar with the statements therein contained; that the facts set forth in said petition are true, as he is informed and believes; and that this petition is not filed for the purpose of delay, but in good faith and in truth for the causes therein set forth.

OSCAR W. UNDERWOOD, JR.

Subscribed and sworn to before me this the 29th day of February, 1932.

GERTRUDE ELLIS,
Notary Public.

62 Filed Mar. 1, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,

vs. Docket No. 43615.

Commissioner of Internal Revenue, Respondent.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Please take notice that we have today lodged with the United States Board of Tax Appeals on behalf of the above named petitioner a petition seeking a review of the Board's decision herein by the Circuit Court of Appeals for the Fifth Circuit, a copy of which petition is hereto attached and served upon you.

(Signed) OSCAR W. UNDERWOOD, JR.,
(Signed) H. C. KILPATRICK,
Attorneys for Petitioner.

Receipt of the above and foregoing notice, together with a copy of the petition mentioned therein, is hereby acknowledged this 1st day of March, 1932.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

63 PETITION FOR REVIEW.

Filed Mar. 1, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs. Docket No. 51,185.
Commissioner of Internal Revenue, Respondent.

Now comes the petitioner, Title Guarantee Loan and Trust Company, as Trustee of the Estate of J. H. Woodward, by its attorneys, E. J. Smyer, Oscar W. Underwood, Jr., and H. C. Kilpatrick, and respectfully shows unto the Court the following:

I.

The petitioner is a corporation organized and existing under the laws of the State of Alabama, with principal office at Birmingham, Alabama, and is trustee under the will of J. H. Woodward, deceased, who died testate on December 15, 1917, while a resident of Alabama. For the taxable year involved in this proceeding, namely, the calendar year 1928, petitioner filed a return as such trustee for the purpose of the federal income tax with the Collector of Internal Revenue for the District of Alabama, and
64 the office of said Collector of Internal Revenue is located within the judicial circuit of the United States Circuit Court of Appeals for the Fifth Circuit.

II.

The nature of the controversy, so far as here pertinent, is as follows:

Under his will and a codicil thereto, both of which were duly admitted to probate in the Probate Court of

Jefferson County, Alabama, J. H. Woodward (hereinafter called the testator) devised his residuary estate to petitioner, as trustee, to be held in trust by petitioner during the life of the survivor of testator's three children, and upon the death of such survivor the corpus to be distributed among the testator's grandchildren then living or their descendants. The trust estate has not been terminated, but is still in existence.

The codicil provided for the payment from income of all cost and expense incident to the protection and preservation of the trust estate, and of taxes, insurance and repairs upon property specifically devised to testator's wife for life; provided for the payment from net income of $25 per month to one Marion Wallace during her life; and provided that all the rest
65 and residue of the net income from the trust estate, as and when received, should be paid over to testator's wife and the other beneficiaries designated in the will, the said wife to receive one-fourth of such net income during her life and the duration of the trust.

The testator's widow did not dissent from the will, as she had a right to do, under the provisions of Sections 6168 and 6169 of the Code of Alabama of 1907. The trust property was delivered to petitioner, as trustee, in the year 1919, and petitioner has acted as such trustee since that time. From that time to and including May 13, 1928, on which date the widow died, petitioner collected the income from the trust property and, after paying from gross income currently the costs and expenses specified by the codicil, it distributed the balance, the net income, currently, as and when received, by paying it over to the beneficiaries, as directed by the codicil. The amounts so paid over to the widow to and including May 13, 1928, aggregated $658,792.69, of which $33,852.00 was paid over during the taxable year here involved.

During the life of the widow, petitioner expended for taxes, insurance and repairs on the property speci-

fically devised to her $29,335.18, which
66 amount was paid from gross income of the trust and not from the widow's distributive share of the net income. The widow received no other benefits from the trust during her life.

The value of the widow's dower and statutory interest in the testator's property, had she dissented from the will, would have been at least $939,580.44.

For the years 1919 to 1928, both inclusive, the petitioner, as trustee of this estate, filed fiduciary returns on Form 1041, with the said Collector, and, in computing therein taxable net income of the estate, deducted from gross income the amounts distributed to the trust beneficiaries named in the will, including the amounts above specified as amounts paid to the widow.

For the taxable year 1928, the respondent has disallowed the deduction of amounts so distributed to the widow, and as a result of such disallowance determined a deficiency in income taxes of $1,130.84. The Board of Tax Appeals, by its decision herein, approved respondent's action.

The hearing before the Board was held January 20, 1932. The findings of fact and opinion of the Board were entered February 12, 1932, and its final order,
fixing the deficiency at the amount deter-
67 mined by the respondent, was entered February 13, 1932.

III.

Petitioner, being aggrieved by the conclusions of law contained in said decision and by the said order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Fifth Circuit.

Wherefore, it petitions that a transcript of record be prepared in accordance with the rules of the said

United States Circuit Court of Appeals for the Fifth Circuit and transmitted to the Clerk of said Court for filing and appropriate action to the end that the error hereinafter set forth may be reviewed and corrected by the said Court.

IV.

The petitioner's assignment of error is as follows:

The Board erred in holding that, in computing the net income of the trust established by the will and codicil thereto of J. H. Woodward, for the calendar year 1928, petitioner, as trustee, was not entitled to deduct the amount of the income of the trust for such taxable year which was distributable currently and which was distributed currently by petitioner, as such trustee, to the widow of said J. H. Woodward, who was one of the beneficiaries of said trust.

Wherefore, your petitioner prays that the Circuit Court of Appeals for the Fifth Circuit review the action and decision of the Board of Tax
68 Appeals in this case and reverse that decision; and that your petitioner have all such other and further relief as it is entitled to and as to the Court may seem just and proper.

E. J. SMYER,
Title Building,
Birmingham, Alabama.
OSCAR W. UNDERWOOD, JR.,
717 Southern Building,
Washington, D. C.,
H. C. KILPATRICK,
717 Southern Building,
Washington, D. C.,
Attorneys for Petitioner.

District of Columbia, ss.

Oscar W. Underwood, Jr., being duly sworn, says that he is one of the attorneys for the petitioner in the above entitled cause; that he has read the foregoing petition and assignment of error and is familiar with the statements therein contained; that the facts set forth in said petition are true, as he is informed and believes; and that this petition is not filed
69-a for the purpose of delay, but in good faith and in truth for the causes therein set forth.

OSCAR W. UNDERWOOD, JR.

Subscribed and sworn to before me this the 29th day of February, 1932.

GERTRUDE ELLIS,
Notary Public.

69-b Filed Mar. 1, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,

vs. Docket No. 51185.

Commissioner of Internal Revenue, Respondent.

To: C. M. Charest, Esq.,
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

Please take notice that we have today lodged with the United States Board of Tax Appeals on behalf of the above named petitioner a petition seeking a review

of the Board's decision herein by the Circuit Court of Appeals for the Fifth Circuit, a copy of which petition is hereto attached and served upon you.

(Signed) OSCAR W. UNDERWOOD, JR.,
(Signed) H. C. KILPATRICK,
Attorneys for Petitioner.

Receipt of the above and foregoing notice, together with a copy of the petition mentioned therein, is hereby acknowledged this 1st day of March, 1932.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

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70 STIPULATION TO CONSOLIDATE RECORD.

Filed Mar. 10, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

Docket No. 43,615, Docket No. 51,185.

The parties to the above entitled proceedings, by their respective attorneys, do hereby stipulate and agree that, in view of the fact that these proceedings involve the same question of law and were consolidated for hearing before the Board, and in view of the fact that the findings of fact and opinion promulgated by the Board cover both proceedings, the Clerk of the

Board of Tax Appeals, in preparing and certifying to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit the documents required by the rules of that Court, may prepare a joint transcript of such documents, including only one copy of opinion.

It is further agreed and stipulated that the transcript of record in the Circuit Court of Appeals may be printed as one document.

OSCAR W. UNDERWOOD, JR.,
H. C. KILPATRICK,
Attorneys for Petitioner,

Dated March 10, 1932.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

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71 PRAECIPE.

Filed Mar. 10, 1932.

United States Board of Tax Appeals.

Title Guarantee Loan & Trust Company, as Trustee of the Estate of J. H. Woodward, Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

Docket No. 43,615, Docket No. 51,185.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and certify to the Clerk of the United States Circuit Court of Appeals for the

Fifth Circuit, within the time allowed by the rules of that Court in this respect, a joint transcript of record in the above entitled proceedings, consisting of the following documents:

1. The docket entries of the proceedings before the Board in each case.

2. Pleadings before the Board in each case.

3. Opinion and decision of the Board.

4. Petition for review and notice of filing in each case.

5. Stipulation for consolidation of the record.

6. This praecipe.

OSCAR W. UNDERWOOD, JR.,
H. C. KILPATRICK,
Attorneys for Petitioner.

72 CERTIFICATE.

Title Guarantee Loan & Trust Co., as Trustee of the Estate of J. H. Woodward, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

Docket Nos. 43615 & 51185.

I, B. D. GAMBLE, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 71, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 30th day of March, A. D. 1932.

(Seal) B. D. GAMBLE, Clerk.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

(Extract from the minutes of January 31, 1933)

No. 6586

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE Estate of J. H. Woodward,

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called and after argument by E. J. Smyer, Esq., for petitioner, and John MacC. Hudson, Esq., special assistant to the Attorney General, for respondent, was submitted to the court.

Opinion of the court

Filed February 17, 1933

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 6586

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE Estate of J. H. Woodward, petitioner

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the United States Board of Tax Appeals (District of Alabama)

(February 17, 1933)

Before BRYAN, FOSTER, and SIBLEY, Circuit Judges

SIBLEY, *Circuit Judge.* The question here is whether in returns for income taxes a testamentary trustee may have a deduction of amounts paid from income to a widow of the testator who takes a share in the trust estate in lieu of dower. The Board of Tax Appeals following its decision in re Butterworth, 23 B.T.A. 838, denied the deduction and the trustee seeks a review.

The years involved are 1924, 1925, 1926, 1927, and a part of 1928. The several applicable revenue acts have this identical provision as to trust estates:

"There shall be allowed as an additional deduction in computing net income of the estate or trust, the amount of the income of the

estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries . . . but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not."

The general purpose apparent is to make the income which is distributed or distributable to the beneficiaries of the trust taxable to them rather than to the fiduciary, thus relieving him and charging them. In the present case the trust was created by will in the residual estate of J. H. Woodward, of Alabama, which the executors were to deliver to the trustee upon trusts that so far as here important are:

"I direct the trustee to pay over from the net income of the trust estate the sum of $25.00 per month to Marian Wallace during the life of Marian Wallace. All the rest and residue of the net income from the trust estate I direct the trustee to pay over as and when received, share and share alike, to my wife Martha Woodward, my son Allen H. Woodward, my daughter Bertha W. Underwood, and my daughter Margaret W. Hopkins, or the survivors of them."

By Alabama Code of 1923, §§ 10503 and 10504, the widow may dissent from the provisions made for her in her husband's will, and take her dower in his lands and a child's part in his personalty; but not dissenting by a writing duly filed in the Probate Court within twelve months after probate, she assents. Mrs. Woodward thus assented, and was paid her share in the net income of the trust estate until her death in May 1928. Prior to 1928 the trustee took deductions for what he paid her, and she paid income taxes on it, but after the decision in United States vs. Bolster, 26 Fed. (2d) 760, she was refunded the taxes she had paid and the deficiencies now charged to the trustee were assessed.

We think Mrs. Woodward is a beneficiary in the trust, receiving the net income therefrom as income, the tax on which is chargeable to her and not to the trustee. The term beneficiary is broadly used in the statute as a correlative to fiduciary and includes those who are the usees in the trust. What was paid Mrs. Woodward was paid her not in discharge of any monetary obligation due by the trust but as her share along with her children in its profits. We agree with the multitude of authorities cited in re Butterworth, 23 B.T.A. 838; United States vs. Fed. (2d) 760; and Allen vs. Brandeis, 29 Fed. (2d) 363, that at the death of her husband this widow had a legal estate in dower in his lands and an undivided one fourth legal interest in his personalty, and the will in effect made an offer to purchase these from her in consideration of what it gave her; and that in electing to take under the will she took as a purchaser for value and not as a volunteer. But we think the Bolster case and that of Butterworth based on it did not sufficiently consider what the widows there involved got—not a money obligation but an estate in an investment.

Had Mrs. Woodward retained her dower in the realty and her fourth interest in her husband's securities, she would have owed taxes on the income she received from them. She exchanged those legal estates for an equitable estate in substantially the same property, but managed for her by a trustee, which she thought preferable. She has changed the form of her investment but the income from it is still income and paid to her as such by the very words of the will to which she assented. She has no charge on or debt against the trust estate. For the sale of her legal rights in her husband's estate she was paid in full by the equitable estate received under the will. Thereafter she was no creditor but the owner of that interest in property, exactly like the interest of each of her children except that she paid for hers and theirs presumably was given to them. The case is otherwise when the widow sells her rights for money, whether paid in a lump sum, or in instalments, or as an annuity. She is in such cases a creditor realizing on the conversion of her property into cash and entitled in general to receive her capital before what she gets becomes gain, and especially so when the getting of it is too uncertain to assign a present value to the obligation which she holds. Burnett vs. Logan, 283 U.S. 404. In Warner vs. Walsh, 15 Fed. (2d) 367, the widow sold her rights for an annuity. The same was true in Allen vs. Brandeis, 29 Fed. (2d) 263. But in the case at bar there was no sale for a money measured price, but an exchange of legal estates for an equitable estate in an investment. What comes from it as income is income to Mrs. Woodward and not capital, just as it is income and not bequest to her children. Irwin vs. Gavitt, 268 U.S. 161; Heiner vs. Beatty, 17 Fed. (2d) 743, affirmed 276 U.S. 598. The petition for review is granted, and the Board of Tax Appeals is directed to allow the deduction accordingly.

Reversed and remanded.

Judgment

Extract from the minutes of February 17, 1933.

No. 6586

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE Estate of J. H. Woodward

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Title Guarantee Loan & Trust Company, as trustee of the estate of J. H. Woodward, for review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decision of the said United States

Board of Tax Appeals in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said Board of Tax Appeals for further proceedings in accordance with the opinion of this court.

In the United States Circuit Court of Appeals for the Fifth Circuit

Order recalling and staying mandate

Extract from the minutes of March 27th, 1933

No. 6586

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE Estate of J. H. Woodward

versus

COMMISSIONER OF INTERNAL REVENUE

For cause shown it is ordered that the mandate of this court, issued to the clerk of the United States Board of Tax Appeals, at Washington, D.C., on the 17th day of March, A.D. 1933, be, and the same is hereby, recalled, and stayed for the period of thirty days from this date; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this court within that time.

Clerk's certificate

UNITED STATES OF AMERICA

United States Circuit Court of Appeals, Fifth Circuit

I, Oakley F. Dodd, clerk of the United States Circuit court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 66 to 73 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said court, numbered 6586, wherein Title Guarantee Loan & Trust Company, as trustee of the estate of J. H. Woodward, is petitioner, and Commissioner of Internal Revenue, is respondent, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 65 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said circuit court of appeals, at my office in the city of New Orleans, Louisiana, in the fifth circuit, this 25th day of April, A.D. 1933.

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals,
Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. —

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

TITLE GUARANTEE LOAN & TRUST COMPANY, AS Trustee of the Estate of J. H. Woodward

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of David Burnet, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above cause on February 17, 1933, reversing a decision of the Board of Tax Appeals (R. 68–69).

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 42–49) is not officially reported. The opinion of the

Circuit Court of Appeals (R. 66) is reported in 63 F. (2d) 621.

JURISDICTION

The judgment sought to be reviewed was entered February 17, 1933 (R. 68–69). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to deduct, in computing the net income of the trust, amounts which are distributed to the testator's widow who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the decedent's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

The facts found by the Board of Tax Appeals (R. 42–49) may be summarized as follows:

The respondent is trustee under the will of J. H. Woodward who died a resident of Alabama on December 15, 1917. The will provided that the residuary estate should be held in trust and the net income therefrom after payment of a small monthly annuity to a named beneficiary should be paid as and when received to the decedent's widow and his three children or their survivors in equal shares.

The will provided for the disposition of the corpus of the trust after the death of the surviving life tenant. The widow elected to accept the provision made for her by the will.

The net income was distributed currently to the widow and three children in accordance with the terms of the will. The income thus distributed to the widow during and prior to the taxable years was less than the amount of her statutory interest in the decedent's estate. In her tax returns from 1919 to 1927 the widow reported amounts thus distributed to her and paid income taxes thereon. Subsequent to the decision of the Circuit Court of Appeals for the First Circuit in *United States* v. *Bolster*, 26 F. (2d) 760, and after the death of the widow, the Commissioner refunded the taxes thus paid, with interest.

In its return of the income of the trust, the respondent deducted the amounts distributed to the widow. The Commissioner disallowed this deduction and determined deficiencies accordingly. The Board of Tax Appeals approved the action of the Commissioner. This decision was reversed by the court below.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions to the widow, in pursuance of her election, were distributions of income as income rather than returns of capital.

2. The Circuit Court of Appeals erred in deciding that the amounts distributed by the respondent to the widow, in pursuance of the terms of the testamentary trust were deductible by the trustee.

3. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals in this case is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Atkins* v. *Commissioner*, 63 F. (2d) 88. In that case a trustee was denied a deduction for annual sums paid to a widow who had renounced her dower rights. The decision was based upon the premise that the widow was a purchaser rather than a true beneficiary. The court below has reached the same result as that adopted by the Circuit Court of Appeals for the Third Circuit in *Julia Butterworth* v. *Commissioner*, *Frank Pardee* v. *Commissioner*, and *Fidelity-Philadelphia Trust Co.* v. *Commissioner*, in which the Government is also seeking certiorari, Nos. — —, October Term, 1932, respectively.[1]

[1] The reasoning upon which the decision below is based is different from that adopted by the Third Circuit. The court below has adopted the view that although the widow takes as a purchaser for value and not as a volunteer, there is merely an exchange of a legal estate for an equitable estate in an investment. The Circuit Court of Appeals for the Fifth Circuit would treat the distributions as taxable to the widow; the Circuit Court of Appeals for the Third Circuit apparently would hold them exempt altogether.

The reasons relied upon as justifying the issue of the writ are presented more fully in the petition in the *Butterworth case*, to which this Court is respectfully referred.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

MAY 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

> SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—
>
> * * * * *
>
> (2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *.
>
> * * * * *
>
> (b) Except as otherwise provided * * * the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—
>
> * * * * *
>
> (2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * * (U.S.C., Title 26, Sec. 960.)

Section 219 (U.S.C.App., Title 26, Sec. 960) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32, is

identical with Section 219 of the Revenue Act of 1924, *supra*. Section 161 (a) (2) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 838, is identical with Section 219 of the Revenue Acts of 1924 and 1926. Section 162 (b) of the Revenue Act of 1928 repeats, without material change, the provisions of Section 219 (b) (2) of the earlier Acts.

The Code of Alabama of 1907, Secs. 6168 and 6169 (brought forward as Secs. 10593 and 10594, Code of Alabama of 1923) provides:

> 6168. *Dissent by widow; her rights on; when dissent unnecessary.*—The widow may, in all cases, dissent from the will of her deceased husband, and, in lieu of the provision made for her by such will, take her dower in the lands, and such portion of the personal estate as she would have been entitled to in case of intestacy. * * *
>
> 6169. *Dissent; when to be made.*—Such dissent must be made in writing, and deposited, within twelve months from the probate of the will, with the judge of probate of the county in which the will is probated; and an entry must be made of record, specifying the day on which the dissent was made.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 78

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF J. H. WOODWARD.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 42–49) is not officially reported. The opinion of the Circuit Court of Appeals (R. 66) is reported in 63 F. (2d) 621.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 17, 1933. (R. 68–69.) The petition for a writ of certiorari was filed May 17, 1933, and was granted May 29, 1933. The jurisdiction of this Court rests on Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interest in the testator's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra* pp. 5–6.

STATEMENT

The facts found by the Board of Tax Appeals (R. 42–49) may be summarized as follows:

The respondent is trustee under the will of J. H. Woodward who died a resident of Alabama on December 15, 1917. (R. 42.) The will provided that the residuary estate should be held in trust and the net income therefrom, after payment of a small monthly annuity to a named beneficiary, should be paid as and when received to the testator's widow and his three children or their survivors in equal shares. (R. 43.) The will provided for the disposition of the corpus of the trust after the death of the surviving life tenant. (R. 44.) The widow did not dissent from the provision made for her by the will. (R. 45.)

The net income was distributed currently to the widow and three children in accordance with the

terms of the will. (R. 45.) The income thus distributed to the widow during and prior to the taxable years was less than the amount of her statutory interest in the decedent's estate. (R. 45–46.) In her tax returns from 1919 to 1927 the widow reported amounts thus distributed to her and paid income taxes thereon. (R. 47.) Subsequent to the decision of the Circuit Court of Appeals for the First Circuit in *United States* v. *Bolster*, 26 F. (2d) 760, and after the death of the widow, the Commissioner refunded the taxes thus paid, with interest. (R. 48.)

In its return of the income of the trust, the respondent deducted the amounts distributed to the widow. The Commissioner disallowed this deduction and determined deficiencies accordingly. The Board of Tax Appeals approved the action of the Commissioner. This decision was reversed by the court below.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions to the widow, in pursuance of her election, were distributions of income as such rather than returns of capital.

2. The Circuit Court of Appeals erred in deciding that the amounts distributed by the respondent to the widow, in pursuance of the terms of the testamentary trust, were deductible by the trustee.

3. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

ARGUMENT

This case presents the precise question involved in *Commissioner* v. *Butterworth,* pending before this Court as No. 75, October Term, 1933. The Court is respectfully referred to the argument and authorities presented in the Government's brief in that case.

As has been pointed out in Point III of the *Butterworth* brief, the reasoning of the court below in the present case is different from that of the Circuit Court of Appeals for the Third Circuit. The court below apparently adopts the view that the income received by the widow is taxable to her, from which it follows that the payments made to her by the trustee may be deducted in the trustee's return. We submit that this conclusion is correct. Our only contention is that if the widow is not taxable, the trustee may not deduct the payments made to her.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed, unless it be concluded that the income in question is taxable in full to the widow.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ERWIN N. GRISWOLD,
SEWALL KEY,
WM. CUTLER THOMPSON,
Special Assistants to the Attorney General.

OCTOBER 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *.

* * * * *

(b) Except as otherwise provided * * * the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *. (U.S.C., Title 26, Sec. 960.)

Section 219 (U.S.C.App., Title 26, Sec. 960) of the Revenue Act of 1926, c. 27, 44 Stat. 9, is identical with Section 219 of the Revenue Act of 1924, *supra*. Section 161 (a) (2) of the Revenue Act of 1928, c. 852, 45 Stat. 791, is identical with Section 219 of the Revenue Acts of 1924 and 1926. Section 162 (b) of the Revenue Act of 1928 repeats, without material change, the provisions of Section 219 (b) (2) of the earlier Acts.

The Code of Alabama of 1907, Secs. 6168 and 6169 (brought forward as Secs. 10593 and 10594, Code of Alabama of 1923) provides:

> 6168. *Dissent by widow; her rights on; when dissent unnecessary.*—The widow may, in all cases, dissent from the will of her deceased husband, and, in lieu of the provision made for her by such will, take her dower in the lands and such portion of the personal estate as she would have been entitled to in case of intestacy. * * *
>
> 6169. *Dissent; when to be made.*—Such dissent must be made in writing, and deposited, within twelve months from the probate of the will, with the judge of probate of the county in which the will is probated; and an entry must be made of record, specifying the day on which the dissent was made.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 979.

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

v.

TITLE GUARANTEE LOAN AND TRUST COMPANY, as Trustee of the Estate of J. H. Woodward, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the court below (R. 66) is reported in 63 Fed. (2d) 621.

The judgment sought to be reviewed was entered February 17, 1933 (R. 68-69). The jurisdiction of this Court is invoked by the petitioner under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether a testamentary trustee is entitled to deduct, in computing the net income of the trust, amounts which are distributed to the testator's widow who accepted the provisions of the will in lieu of her dower and statutory interests in the decedent's estate.

STATUTES INVOLVED.

The material statutory provisions, enacted in the Revenue Act of 1924, re-enacted in identical form in the Revenue Act of 1926, and re-enacted without material change in substance in the Revenue Act of 1928, are set forth in the appendix to the petition for writ of certiorari.

STATEMENT.

The facts found by the Board of Tax Appeals (R. 42-49) may be summarized as follows:

The respondent is trustee under the will of J. H. Woodward, who died a resident of Alabama on December 15, 1917. The will provided that the residuary estate should be held in trust by respondent and the net income therefrom, after payment of a small monthly annuity to a named beneficiary, should be paid as and when received to the decedent's widow and his three children or their survivors in equal shares. The testamentary provision referred to was in terms as follows:

> "I direct the trustee to pay over from the net income from the trust estate, the sum of Twenty-five ($25.00) Dollars per month to Marion Wallace during the life of Marion Wallace. All the rest and residue of the net income from the trust estate, I direct the trustee to pay over as and when received share and share alike, to my wife, Martha Woodward, my son Allan H. Woodward, my daughter, Bertha W. Underwood, and my daughter, Margaret W. Hopkins, or the survivors of them * * *."

The will provided for the disposition of the corpus of the trust after the death of the surviving life tenant. The widow elected to accept the provision made for her by the will.

The net income was distributed currently to the widow and three children in accordance with the terms of the will. The income thus distributed to the widow during and prior to the taxable years was less than the value of her statutory interest in the decedent's estate. In her tax returns from 1919 to 1927 the widow reported amounts thus distributed to her and paid income taxes thereon. Subsequent to the decision of the Circuit Court of Appeals for the First Circuit in *United States v. Bolster*, 26 Fed. (2d) 760, and after the death of the widow, the Commissioner refunded to the executor of the widow the taxes thus paid, with interest.

In its returns of the income of the trust estate, the respondent deducted the amounts distributed to the widow. The Commissioner on February 26, 1929, disallowed these deductions for the years 1924 to 1927, inclusive, and on October 15, 1930, disallowed the 1928 deduction, and determined deficiencies accordingly. The Board of Tax Appeals approved the action of the Commissioner. This decision was reversed by the Court below.

ARGUMENT.

1. *The only possible question is whether the widow was a beneficiary within the meaning of the statute.*

The petitioner asserts three errors, the third a general specification.

The first specification asserts that the Circuit Court of Appeals erred in holding that the distributions to the widow were distributions of income as income, rather than returns of capital. The Court below did express its view that the widow, not the trustee, was taxable. However, the

trustee's fiduciary returns are before the Court in this case, not the widow's returns, and it is respectfully submitted that this question is not cognizable in this case.

The second specification, to the effect that the Circuit Court of Appeals erred in deciding that the amounts distributed by the trustee to the widow were deductible by the trustee, goes to the heart of the question determined below, and is the only question which may exist in this case.

Obviously, if the widow was a beneficiary, the statute *requires* that amounts distributed to her from the income of the trust be allowed as deductions in computing the net income of the trust.

The Board of Tax Appeals held that she was not a beneficiary, and the First Circuit adopted the same view in the case of *Atkins v. Commissioner*, 63 Fed. (2d) 88, involving similar facts. The Fifth Circuit in the instant case and the Third Circuit in the cases of *Julia Butterworth v. Commissioner*, 63 Fed. (2d) 944, *Frank Pardee v. Commissioner*, 63 Fed. (2d) 948, and *Fidelity-Philadelphia Trust Co. v. Commissioner*, 63 Fed. (2d) 949, held that under such circumstances the widow is a beneficiary as that term is used in the statute.

That the widow stood in the relation of *cestui que trust* to the property held in trust by respondent has never been questioned, the petitioner's argument being that all *cestuis que trustent* are not beneficiaries of the trust.

2. *This Court in Reinecke v. Smith has settled the definition of "beneficiaries" as used in the statute.*

In the case of *Reinecke v. Smith*, 53 Sup. Ct. 570 (decided April 10, 1933, after the decisions were made in all of these cases in the First, Third and Fifth Circuit), it was argued by the respondent that the term "beneficiary", as used in subdivision (g) of Section 219 of the Revenue Act of 1924, included the trustee. Subdivision (d) of

the same section is before the Court in the instant case. There is nothing in the statute to indicate that Congress intended to use the term in different senses in these two subdivisions, but on the contrary, they both have to do with the taxation of "the income of estates or of any kind of property held in trust" (see subdivision (a) of the same section). It must be presumed therefore, that the term is used in the same sense in both subdivisions. *Pampanga Mills v. Trinidad*, 279 U. S. 211.

In the *Reinecke* case, the argument that the trustee was a beneficiary was rejected by this Court in the following language:

> "The unambiguous phraseology of the Act precludes the suggested construction. A trustee is not subsumed under the designation beneficiary. Both words have a common and accepted meaning; the former signifies the person who holds title to the *res* and administers it for the benefit of others; the latter the *cestui que trust* who enjoys the advantages of such administration. The ordinary meaning of the terms used, which we are bound to adopt (Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U. S. 552, 560, 76 L. ed. 484, 489, 52 S. Ct. 211), and the view held by those charged with the enforcement of the Act, ratified by reenactment of the section, alike forbid the adoption of the construction for which the respondents contend."

This language is a clear denial of petitioner's argument that the word beneficiary, as used in the statute here under consideration, is not the equivalent of *cestui que trust*.

CONCLUSION.

The conflict of the decision below and its companion cases in the Fifth Circuit with the decision of the First Circuit in *Atkins v. Commissioner, supra*, has been settled by this Court's decision in *Reinecke v. Smith, supra*. All occasion for granting the writ of certiorari herein has been removed

by the *Reinecke* decision, and we ask the Court to deny the petition on that ground. See *San Pedro, Los Angeles & Salt Lake Railroad Company v. United States*, 247 U. S. 307, 309.

Respectfully submitted,

E. J. SMYER,
OSCAR W. UNDERWOOD, JR.,
H. C. KILPATRICK,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 78.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF J. H. WOODWARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

OSCAR W. UNDERWOOD, JR.,
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Attorneys for Respondent.

E. J. SMYER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 78.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

TITLE GUARANTEE LOAN & TRUST COMPANY, AS TRUSTEE OF THE ESTATE OF J. H. WOODWARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (R. 42-49) is not officially reported. The opinion of the Circuit Court of Appeals (R. 66-68) is reported in 63 Fed. (2d) 621.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered February 17, 1933 (R. 68-69). The petition for a writ of certiorari was filed May 17, 1933, and was granted May 29, 1933. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, the amount of the income of the trust for its taxable year which is to be distributed currently by the trustee to the testator's widow, one of the *cestuis que trustent* named in the will, where the widow, under the local law, had the right within a limited time to dissent from the will, but failed to exercise the right, and so took under the will.

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix, *infra*, pp. 16, 17.

STATEMENT.

To the summary of the facts, set out on pages 2 and 3 of petitioner's brief herein, we add the following:

The trust property was devised to the trustee in trust, and delivered to the trustee in the year 1919 (R. 45). By the terms of the trust, the trustee was authorized and directed to pay from income all cost and expense incident to the preservation and protection of the trust estate, and: "All the rest and residue of the net income from the trust estate, I direct the trustee to pay over *as and when received,* share and share alike to my wife, Martha Woodward, my son Alan H. Woodward, my daughter, Bertha W. Underwood, and my daughter, Margaret W. Hopkins, or the

survivors of them." There is no mention of dower or statutory interest anywhere in the trust or will, and no reference thereto.

The trust is to terminate on the death of the survivor of the three children. On the termination of the trust, the trustee is directed to divide the trust property share and share alike between the grandchildren of testator then living, the descendant of a deceased grandchild taking the share which the parent would have taken if living. (R. 43, 44.)

The widow, Martha B. Woodward, died May 13, 1928 (R. 45). The decision in the *Bolster* case was handed down one month after the death of the widow. (R. 47.) 26 Fed. (2d) 760.

From the time the trust property came into the custody of the trustee, in 1919, to May 13, 1928, the date of death of the widow, distribution was made to the widow by the trustee currently "as and when received" in the amount of her distributive share of the net income. (R. 45.) For the taxable years 1919 to 1928, both inclusive, the trustee filed fiduciary returns with the Collector, and in computing the taxable income of the trust estate, deducted from gross income the amount so distributed to all of the beneficiaries in accordance with the terms of the trust. The petitioner allowed these deductions without question until February 26, 1929, when he denied respondent the right to deduct amounts distributable to the widow for the years 1924 to 1927 inclusive (R. 15-21), and on October 15, 1930, he denied a similar deduction for 1928 (R. 37-40). Martha B. Woodward made and filed with the Collector an individual income tax return for each of the taxable years 1919 to 1927, both inclusive, and in each return included the amount which had been distributed to her during the taxable year, and paid income tax thereon. (R. 47.) The taxes so paid for the years 1923 to 1927, inclusive, were refunded to her executor in 1930 (R. 47-48).

SUMMARY OF ARGUMENT.

I.

The statute permits, unconditionally and without exception, the deduction by the fiduciary of the amount of the income of the trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries. The statute contains no express exception or limitation, nor does it contain language which can be construed as supplying such an exception or limitation.

II.

The testator's widow was a "beneficiary" of the trust of which respondent was the trustee or fiduciary, so the amount of the trust income distributable currently to her was deductible in computing the net income of the trust. The term "beneficiary" is synonymous with the term "*cestui que trust*". This well established meaning, recognized for years by the executive and ratified by repeated reenactments of Congress, may not be disturbed. Neither the non-taxability of the widow nor the theory that she is a purchaser can alter the meaning of the term.

ARGUMENT.

This and the companion cases, Nos. 75, 76 and 77, involve similar questions, except for the fact that in No. 77, *Helvering v. Pardee,* the widow was given a fixed annuity under her husband's will, whereas in this case and in Nos. 75 and 76 the widow was to receive distributions only from the income, if any, of the trust.

I.

The statute permits, unconditionally and without exception, the deduction by the fiduciary of the amount of the income of the trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries.

The pertinent provisions of the statute here under consideration are these, appearing in Section 219 (b) of the Revenue Acts of 1924 and 1926, and being in substance the same as Section 162 (b) of the 1928 Act:

> "* * * The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in Section 212, except that—
>
> * * * * * * *
>
> "(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *"

The terms of this statute are clear, and when the terms of a statute are clear they must be enforced.

The will directed that the income should be distributed "as and when received" to the widow and the children (Pet. brief p. 2; R. 43), in other words, "currently". Therefore, so far as the trustee is concerned, it, the trustee, under the plain and unambiguous terms of the law, is entitled to the deduction.

The statement in the statute that the amount allowed as a deduction shall be included in computing the net income of the beneficiaries "whether distributed to them or not" is something which relates to the beneficiaries, not to the trustee; and, after examining the petitioner's contentions, we shall show that Congress included that clause to make

the income taxable to the beneficiaries, if taxable at all, in the same year for which it is deducted by the trustee upon its fiduciary return (pp. 8, 9).

Now, let us examine the petitioner's contentions: The petitioner, while admitting on the one hand that the widow here was a "beneficiary" and denying it on the other hand (a position hereafter discussed at p. 11) contends that the right to the deduction is "only on the condition that the liability to the tax is transferred with the payments." This conclusion is based upon the following reasoning:

1. That there is manifest in the statute an intention on the part of Congress to tax all income of trust estates, which intention should not be thwarted by the Court;

2. That since, under decisions cited, the widow was not subject to tax on the distributions here in question, to allow the trustee the deduction would be to permit the income to escape taxation with the result that an *exemption* would be established "by inference or presumption", which is not permissible;

3. That the only course left open to the Court is to construe the statute as permitting the deduction only upon condition the amount deducted shall be taxed to the distributee.

We answer these propositions as follows:

1. This Court may not enforce a general intention to tax all incomes unless that intention "be carried into language which can reasonably be construed to effect it." See *Smietanka v. First Trust and Savings Bank,* 257 U. S. 602, 605, 606, 66 L. ed. 391, 393, where a collector contended that income accumulated by a trustee for unborn and unascertained beneficiaries should be taxed, under an alleged general intention of Congress to tax all incomes.

Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written. *United States v. Standard Brewery,* 251 U. S. 210, 217, 64 L. ed. 229, 243. The literal

meaning of the words employed is most important, for taxing statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved in favor of the taxpayer, *United States v. Merriam*, 263 U. S. 179, 187, 188, 68 L. ed. 240, 244. *United States v. Field*, 255 U. S. 257, 262, 65 L. ed. 618, 620.

2. The question here presented is the right of the trustee to a *deduction* in computing net income. The question of the *exemption* of that income from taxation is not involved. The rule, cited by the petitioner, that nothing is to be taken by inference or presumption in favor of an exemption, has no application in the determination of the right to a deduction from gross income in computing the net income. A liberal construction is given to words of *exception* confining the operation of a tax, though the rule regarding *exemptions* may be different. *Eidman v. Martinez*, 184 U. S. 578, 583, 46 L. ed. 697, 701. Though the petitioner repeatedly insists that a question of *exemption* is involved here, a glance at the statute will show that nothing in the nature of an exemption was mentioned or contemplated.

3. While carefully refraining from an assertion that Section 219 (b) (2) contains an express limitation upon the trustee's right to deduct income distributions to beneficiaries, the petitioner repeatedly asserts that the deduction is limited to amounts which are taxable in the hands of the beneficiary. By inference, petitioner supports this position by citing that clause of the statute which provides: "but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not." But the statute does not say that the trustee may take the deduction "on condition" or "provided," or "if" the amount deducted is included in computing the beneficiary's income. Congress might have used such terms had it wished, although it is

likely that Congress, if it had the intention attributed to it by the petitioner, would have made its meaning entirely clear through an outright statement that the trustee might have the deduction if the beneficiary should pay tax upon the amount distributed.*

Congress did not intend to attach a condition to the allowance of the deduction. On the contrary, we assert confidently that it is evident, from an examination of the statute as a whole, that the clause in question was inserted in the statute for the sole and only purpose of providing that the income should be taxable to the beneficiary *in the same taxable year in which it should be deductible by the trustee.*

Section 213 (a) of the 1924 (26 U. S. C. A. § 954; c. 234, 43 Stat. 267) and 1926 (c. 27, 44 Stat. 23) Revenue Acts, and Section 22 (a) of the 1928 Act (c. 852, 45 Stat. 797), provided that gross income should include "gains, profits, and income derived from * * * dealings in property * * * growing out of the ownership * * * of or interest in such property; also from interest, rent, dividends, securities * * * or gains or profits and income derived from any source whatever"; and also Section 213 (a) of the 1924 and 1926 Acts, and Section 42 (c. 852, 45 Stat. 805) of the 1928 Act, provided that the amount of all such items "shall be included in the gross income for the taxable year *in which received by the taxpayer,*" with an exception in the case of a taxpayer whose books should be kept on a different basis. Under these provisions the taxability of an individual recipient of income was established, although the time of taxability was made to depend upon the time of receipt in the case of one reporting on the basis of cash receipts. Without further specific provision, therefore, the beneficiary might be taxable upon the trust income in a year subsequent to that in which the fiduciary might take the deduction, since the fiduciary was allowed to deduct the

*The trustee's failure to take advantage of a statutory deduction does not give the beneficiary a right to the same. *Riker v. Com'r.*, 42 Fed. (2d) 150, *Little v. White*, 47 Fed. (2d) 512.

amount "which is to be distributed", and was not limited to actual distributions within the year of deduction. It was to meet this incongruous situation that the language upon which the government now relies was inserted in Section 219. The important provision in that clause is the phrase "whether distributed to them or not." By the use of this language it was made plain that the beneficiary of a trust estate should return distributable trust income for the year in which the fiduciary was allowed the deduction, and could not postpone the return thereof until actual receipt, as he could otherwise have done under Section 213 (a).

The absurd consequences which would result from reading into the statute the condition proposed by the petitioner are apparent. The fiduciary, in every case, would be required, at his peril, to determine whether or not the distribution would be taxable to the beneficiary.† This might indeed be a heavy burden when it is considered that pre-existing relations between the creator of the trust and the beneficiary, the character of the beneficiary, the statutory exemptions or deductions allowed the beneficiary, or some other fact or circumstance might affect the taxability of part or all of the distribution in the hands of the beneficiary. Under this construction, a prudent trustee might be forced in effect to interplead the government and the beneficiary and call upon the courts for a determination, in each instance, of the extent of the beneficiary's tax liability as a prerequisite to the determination of the trustee's right to a statutory deduction.

† In fact, the petitioner seems to argue (p. 25 of brief in No. 75) that the fiduciary may take the deduction only if the beneficiary "does in fact pay the tax"; that is, even if the distribution be *taxable* to the beneficiary, the fiduciary may not take the deduction if the fiduciary *fails to pay* the tax. In other words, petitioner would make the fiduciary's right to the deduction depend upon the beneficiary's failure or refusal, perhaps long after the distribution, to perform an act which the trustee is powerless to require.

II.

The testator's widow was a beneficiary of the trust.

The petitioner contends that the widow was not a "beneficiary" of the trust established by the will of J. H. Woodward. By that will, the decedent devised and bequeathed his residuary estate to respondent in trust, the net income therefrom, after payment of a small monthly annuity to a named beneficiary, to be paid over, as and when received, to the testator's widow and his three children, in equal shares (R. 23).

In *Reinecke v. Smith* (decided April 10, 1933), 289 U. S. 172, 77 L. ed. 692, 693, it was argued by the respondent that the term "beneficiary", as used in subdivision (g) of Section 219 of the Revenue Act of 1924, included the trustee. Subdivision (b) of the same section is before the Court in the instant case. There is nothing in the statute to indicate that Congress intended to use the term in different senses in these two subdivisions, but on the contrary, they both have to do with the taxation of "the income of estates or of any kind of property held in trust" (see subdivision (a) of the same section). It must be presumed therefore, that the term is used in the same sense in both subdivisions. *Pampanga Mills v. Trinidad*, 279 U. S. 211, 73 L. ed. 665.

In the *Reinecke* case, the argument that the trustee was a beneficiary was rejected by this Court in the following language:

> "The unambiguous phraseology of the Act precludes the suggested construction. A trustee is not subsumed under the designation beneficiary. Both words have a common and accepted meaning; the former signifies the person who holds title to the *res* and administers it for the benefit of others; the latter the *cestui que trust* who enjoys the advantages of such administration. The ordinary meaning of the terms used, which we are bound to adopt (Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U. S. 552, 560, 76 L. ed. 484, 489, 52 S. Ct. 211), and the view held by those charged

with the enforcement of the Act, ratified by re-enactment of the section, alike forbid the adoption of the construction for which the respondents contend."

The definitions of "trustee" and "beneficiary" thus stated are those accepted by common understanding and universally by the courts. It must be presumed that Congress used the terms in the same sense. *United States v. Merriam,* 263 U. S. 179, 187, 68 L. ed. 240, 244.

The petitioner, however, urges that the common and accepted meaning of the term "beneficiary" should not be adopted in construing Section 219 (b) (2) of the 1924 and 1926 Acts and the corresponding provision of the 1928 Act, but that the term "beneficiaries" should be applied only to those distributees of trust income who are taxable on *distributions received.* Contending with one breath that the widow in the instant case was so taxable, and with the next that she was not, petitioner does not unequivocally place her within or without the term "beneficiaries", but seems to argue that if she is not taxable, she is not a beneficiary, and that, only on that theory, the trustee is not entitled to the deduction. This novel contention is no doubt derived from the perplexing position in which the petitioner, as an administrative officer, finds himself, and of which he is at pains to explain to the Court. The petitioner attempts to support his position by the statement that this Court has already adopted the construction contended for in *Burnet v. Whitehouse,* 283 U. S. 148, 75 L. ed. 917. In that case it was held that an annuity payable from corpus and regardless of income, constituted a bequest. In holding that Section 219 does not make the payments taxable, the Court pointed out that Section 219 applied only to income of the trust, paid as such to a beneficiary, and that the annuity payments there involved were payable regardless of whether they were from income or corpus. Since the terms of the will in the instant case permit distributions only from income of the trust estate

and since the distributions here were distributions "of income paid as such to a beneficiary," the *Whitehouse* decision supports our position, rather than petitioner's, and certainly it is not authority for ignoring the well-settled meaning of the term "beneficiaries."

The petitioner asserts that the court below erroneously gave the word "beneficiaries" its "most comprehensive meaning." While we contend that the word, as used in the law of trusts, has only one meaning, the "comprehensive" meaning in question, we submit that, if there were any doubt as to its meaning, that doubt should be resolved in favor of the construction for which we contend, not only because doubts must be resolved against the government, but also by reason of the long established executive construction given to the statute. The statutory provision here under consideration was re-enacted without substantial change in all of the revenue acts subsequent to the 1924 Act. (See Sec. 219, Rev. Act of 1926, and Sec. 162, Rev. Acts of 1928 and 1932.) In Regulations 65, Art. 347 (see appendix, p. 17), construing subdivisions (g) and (h) of Section 219 of the 1924 Act, the Commissioner of Internal Revenue defined the term "beneficiary", as including "any person entitled to an interest in the income or the principal of a trust." By its subsequent re-enactments, Congress impliedly approved the construction given in the regulations which the Commissioner had followed since 1918, and it was not until 1929 that the Commissioner attempted to give the narrow meaning now urged by him. Congress is presumed to have legislated with the knowledge of the established custom or usage of the executive department.

Old Colony R. R. Co. v. Com'r., 284 U. S. 552, 76 L. ed. 484.
Nat'l Lead Co. v. United States, 252 U. S. 140, 64 L. ed. 496.

The ordinary meaning of the term "beneficiaries", and the view held for so many years by those charged with the

enforcement of the Act, ratified by re-enactment of the section, alike forbid the adoption of the construction for which the petitioner contends. *Reinecke v. Smith, supra.*

Apparently realizing the difficulties inherent in his argument that the "beneficiaries" mentioned in the statute are only those distributees who are taxable or who pay tax upon distributions received, petitioner falls back upon the theory upon which these cases were decided by the Board of Tax Appeals, namely, that, since the distributions to the widow constituted a return of capital to her, they were not distributions of trust income *as such* to her, and therefore are not covered by the terms of Section 219 (b) (2). True, petitioner argues that the distributions were income in her hands and not a return of capital, but he urges this Court to review that question and decide first whether such distributions did constitute a return of capital, and if so, to deny the respondent's right to the deduction.

In the instant case, the Circuit Court of Appeals repudiates the so-called return of capital theory, and holds that the distributions to the widow represented taxable income to her, as did the New York Court of Appeals in *People ex rel. Kight v. Lynch,* 255 N. Y. 323. The Circuit Court of Appeals for the Third Circuit in the companion cases, Nos. 75, 76 and 77, refused to decide the question of the taxability of the widow and based its decision upon the plain words of Section 219. Under the law of Alabama, a widow who takes under the will in lieu of dower is not a creditor of the estate. Although she is preferred over other beneficiaries, the creditors' rights have priority over hers. *Steele v. Steele,* 64 Ala. 438.

Clearly, the respondent here could and did distribute nothing but income of the trust, and we submit that, whether that income was taxable income or non-taxable in the hands of the widow, Section 219 permits the fiduciary to deduct it, and it is a clear perversion of the theory of the return of capital to hold that, because of that theory, the widow was not a beneficiary. A similar contention was

considered and rejected in *Orton v. Orton,* 42 N. Y. (3 Keyes) 486, cited with approval in *United States v. Merriam,* 263 U. S. 179, 184, 68 L. ed. 240, 243. In the *Orton* case, the legacy was given in lieu of dower, and a provision was made that, should there be a surplus after the payment of specific legacies, the legatees should share proportionately therein. The executor contended that the widow was not entitled to share in the surplus, *because a bequest in lieu of dower was not a legacy;* in other words, that the widow did not take as a legatee, but as a purchaser for value. However, the Court held, notwithstanding the bequest was declared by the will to be in lieu of dower, that it was still a legacy. The Court said:

> "Every bequest of personal property is a legacy, including as well those made in lieu of dower and in satisfaction of an indebtedness as those which are wholly gratuities. The circumstance whether gratuitous or not does not enter into consideration in the definition."

This language was adopted by this Court in *United States v. Merriam, supra,* where it was held that bequests in lieu of compensation for acting as such, were exempt from taxation, as bequests in the hands of the executors. It was there unsuccessfully argued that the term "bequest" implied a bounty or gratuity.

In *Gruver v. Wood,* 174 Mass. 540, it was held that a widow who took a bequest in lieu of dower was nevertheless a "beneficiary under the will."

If the terms "legacy", "bequest", and "beneficiary" in the law of wills do not depend upon the circumstance of being gratuitous, clearly the term "beneficiary of a trust" has no reference to such a circumstance. The interest of a beneficiary under a trust may be acquired by purchase, by testamentary disposition, or by gift *inter vivos. Butterworth v. Commissioner,* 63 Fed. (2d) 944, 947. This is fundamental law, presumably known to Congress when it used the term in the statute.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed, whether this Court considers the distributions to the widow as taxable income to her or not.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

SEC. 219 (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *

* * * * * * *

(b) Except as otherwise provided * * * the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * * (26 U. S. C. A. § 960.)

Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32, is identical with Section 219 of the Revenue Act of 1924, *supra*. Sections 161 and 162 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 838, are substantially the same as Section 219 of the Revenue Acts of 1924 and 1926. Section 162 (b) of the Revenue Act of 1928 repeats, without material change, the provisions of Section 219 (b) (2) of the earlier Acts.

The following Sections of the Code of Alabama of 1907 were in effect from the time that the respondent entered upon its duties as trustee in 1919, being re-enacted in the Code of 1923 under the section numbers shown in parentheses:

SEC. 3812 (7427) *Dower Defined;* * * * Dower is an estate for the life of the widow in a certain portion of the following real estate of her husband, to which she has not relinquished her right during the marriage; * * *

SEC. 3813 (7428) *Extent of widow's dower interest.* The quantity of the dower interest is as follows:

(1) When the husband dies leaving no lineal descendants and his estate is not insolvent, a widow is entitled to be endowed of one-half his lands. * * *

(3) When there are lineal descendants, then to one-third part thereof, whether the estate be solvent or not.

SEC. 6168 (10593) *Dissent by widow; her rights on;* * * * The widow may, in all cases, dissent from the will of her deceased husband, and, in lieu of the provision made for her by such will, take her dower in the lands and such portion of the personal estate as she would have been entitled to in case to intestacy. * * *

SEC. 6169 (10594) *Dissent; when to be made.*—Such dissent must be made in writing and deposited within twelve months from the probate of the will with the judge of probate of the county in which the will is probated, and an entry must be made of record specifying the day on which the dissent was made. * * *

Treasury Regulations.

Article 347 of Treasury Regulations 65 construing Section 219 of the Revenue Act of 1924, provided in part as follows:

> The term "beneficiary" as used in this article includes any person entitled to an interest in the income or the principal of a trust, but does not include one having merely a nominal interest in the income or principal.

This definition was brought forward in Regulations 69, Article 347, construing Section 219 of the Revenue Act of 1926, and in Regulations 74, Article 881, construing Section 161 of the Revenue Act of 1928.